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No. _____

In The
Supreme Court of the United States
October Term, 1999

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMMENT; AND CITY OF MEMPHIS, TENNESSEE,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

1. Where a plaintiff-landowner seeks relief from a regulatory taking of its property and, as required by this Court's holding in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), proceeds to "ripen" its case by first seeking (and being denied) compensation in the state courts before seeking relief under 42 U.S.C. § 1983 in federal court, may a U.S. District Court nonetheless dismiss such an action on the ground that the very process of "ripening" the case in the state court litigation — in the manner required by *Williamson County* — simultaneously works to bar it under the doctrine of *res judicata*?

2. *A fortiori*, may a U.S. District Court so rule where it is conceded in open court that, in depriving the plaintiffs of their constitutional rights, the defendant municipality acted "arbitrarily, capriciously, and illegally" and where the municipality "in essence . . . stipulated that [it] had violated plaintiff's rights under both the Tennessee and United States Constitutions" (App. B, p. 8)?

3. Was it this Court's intention in *Williamson County* to single out American property owners as the *only* class of plaintiffs whose 42 U.S.C. § 1983 claims may *never* be heard in federal court, because the required process of "ripening" their causes of action in state court simultaneously serves to bar them from federal court, as held by the court below, which thereby intensifies a wide-ranging conflict of decisions in which the 3d, 6th, 9th, and 10th Circuits disagree with the 4th, 5th, and 11th Circuits?

PARTIES TO THE PROCFEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Rainey Brothers Construction Company, Inc. has neither parent nor subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rainey Brothers Construction Company, Inc. respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit was filed on April 5, 1999 and was not recommended for publication. (Appendix A.) The trial court's decision was filed on June 18, 1997, and reported as *Rainey Brothers Construction Company, Incorporated v. Memphis and Shelby County Board of Adjustment*, 967 F. Supp. 998 (W.D. Tenn. 1997). (Appendix B.) The trial court's unpublished judgment was filed on June 19, 1997. (Appendix C.)

JURISDICTION

This case arises from the lower courts' refusal to follow this Court's decision in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), and try the merits of Rainey Brothers' 5th Amendment regulatory takings and 14th Amendment due process claims after Rainey Brothers had duly "ripened" its case by seeking — and being denied — compensation in the Tennessee courts, precisely as required by *Williamson County*. That process took time, but — as became apparent in the recent decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999), recounting an 18-year odyssey through the planning and litigation process — regulatory taking cases can be time consuming.

The issue of how lower federal courts are to apply *Williamson County* is presented here in an intriguingly pure form: *there is no question of federal constitutional liability — it is admitted; the only question is whether these concededly damaged property owners may obtain their constitutional remedy in any court.* The issue is starkly framed because the governmental

defendants *stipulated* that they had violated Rainey Brothers' constitutional rights. As the District Court put it:

> "On the first day of the trial [in state court], the City Attorney, representing the City and the Board, stipulated in open court that the Board and the City had acted arbitrarily, capriciously, and illegally . . . [and] [i]n essence, defendants stipulated that they had violated plaintiff's rights under both the Tennessee and United States Constitutions." (App. B, p. 8.)

Notwithstanding this concession of liability, and the state trial court's consequent finding that the governmental actions were "void, capricious, arbitrary and illegal" (App. B, p. 8), the state court refused to award Rainey Brothers *any* compensation (App. B, p. 8) because of its erroneous belief that the state's tort claims act immunized the government from any compensatory judgment (App. B., p. 19), and also refused to order reinstatement of the wrongfully rescinded permits, thus purporting to "uphold" their rights with empty words, while denying them any remedy whatever.[1]

After unsuccessfully appealing the state court denial of compensation, Rainey Brothers filed suit in U.S. District Court under 42 U.S.C. § 1983 to recover compensation for the deprivation of its property without due process and the taking of its property without just compensation, precisely as required by *Williamson County*. But the District Court dismissed the action on the ground that the concededly wrongly decided Tennessee proceedings were *res judicata*. The 6th Circuit affirmed.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] In their 6th Circuit brief, the City and the Board conceded that "the state court *incorrectly* held that no monetary award would be granted because Tenn. Code Ann. § 29-20-205 precluded such an award..." (Final Br. of Appellees p. 30; emphasis added.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 5th and 14th Amendments to the United States Constitution, along with pertinent federal and state statutes and rules, are reproduced in Appendices D - Q.

STATEMENT OF THE CASE

The run-around to which the Rainey Brothers company was subjected is reminiscent of that described recently by this Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999), with one stunning exception: here, the governmental wrongdoers *stipulated* that they violated the property owner's constitutional rights, and conceded that they wrongfully took the very actions that gave rise to this constitutional claim. (App. B, p. 8, quoted above.) Thus, there was never any contested issue of liability: the only issue was the availability of a remedy — any remedy — for a *conceded* constitutional violation. Yet, so far, both the state and federal judiciaries have refused to provide any remedy whatever. Before parsing the procedural path (dare one say, "shell game"?) followed by the lower courts to achieve that ignominious end, a brief recitation of the underlying facts is in order.

Rainey Brothers bought a 14-acre parcel of vacant land in Memphis, Tenn., which it intended to develop for residential use. Initially, it presented a preliminary plan to the City for single-family homes. Upon being informed that the property would have to be filled, in order to raise the minimum building elevation, Rainey Brothers concluded that the added cost made single-family homes infeasible, and opted instead for multi-family dwellings. Its request for a rezoning to R-4, to permit construction of 432 apartment units, was rejected; but later, the city approved rezoning to R-3A, which would permit 244 apartment units. Relying on that, Rainey Brothers sought a building permit for a 244-unit apartment project. (App.B, pp.2-3.)

At that point, things took a turn for the ugly. The City's mayor was apparently opposed to the project, and illegally

"instructed" the building department not to issue the permit, notwithstanding Rainey Brothers' clear legal right to the permit under R-3A zoning. The building department complied with the mayor's instructions, rather than the law. (App. B, p. 3.)

On appeal (exhausting all administrative remedies), the Board of Adjustment ruled that a permit must issue, but gave Rainey Brothers permission to construct only 165 apartment units, rather than the 244 permitted by the zoning. (Compare *Del Monte Dunes.*, 119 S.Ct. at 1632.) Additionally, the Board required the buildings to be constructed at a higher elevation (i.e., above the existing grade). Later, the Board granted Rainey Brothers a variance reducing the required elevation by several feet. (App. B, pp. 3-4.)

Taking a cautiously conservative approach, Rainey Brothers waited 60 days (the time, under local law, for anyone to challenge the variance) before taking any action. When no challenge materialized and the variance became final, Rainey Brothers entered into contracts with engineers, materialmen, suppliers, and plumbers for construction of its project. It also obtained inspections and approvals from the appropriate City departments, and arranged financing. Concrete slabs were poured and framing for the buildings was constructed at substantial cost. (App. B, p. 4.)

Seven months after Rainey Brothers obtained its variance and building permits and made substantial commitments and substantial progress in construction, a complaint was made to the Board that the variance should not have been granted, although by then Rainey Brothers' rights under the variance had vested under state law. (See *State ex rel. SCA Chem. Waste Serv., Inc. v. Konigsberg*, 636 S.W.2d 430, 437 [Tenn. 1982]; *Howe Realty Co. v. City of Nashville*, 141 S.W.2d 904, 906 [Tenn. 1940].) *Without giving Rainey Brothers any notice or opportunity to be heard*, the Board summarily and *ex parte* revoked the variance, reinstated the higher building elevation requirement, and left

Rainey Brothers with a significant part of its project already constructed at what had just retroactively become an illegal elevation. The Board's action required Rainey Brothers to tear out the construction, bring in tons of dirt to fill the land to raise its elevation, and begin anew, all at enormous additional expense. (App. B, p. 5.)

After the Board denied Rainey Brothers' petition for "rehearing" (which, because of the lack of notice of the original action, would have been Rainey Brothers' only hearing), the City revoked all permits previously issued. (App. B, p. 5.)

That's when Rainey Brothers sued.

The City and the Board knew they had done wrong, but they nonetheless forced Rainey Brothers to litigate. Forcing them into court was one thing, however; actually trying the case on the "merits" (if that term may be used here without doing violence to the English language and to the rudiments of due process) was something else. As the state court trial began, counsel for the City and the Board confessed his clients' constitutional wrongdoing. The City and the Board, he conceded, "had acted arbitrarily, capriciously, and illegally." (App. B, p. 8.) "In essence," the U.S. District Court would later summarize, "defendants stipulated that they had violated plaintiff's rights under both the Tennessee and United States Constitutions." (App. B, p. 8.)

That concession resulted in a state trial court determination that the actions of the City and the Board were "void, capricious, arbitrary, and illegal . . . ." (App. B, p. 8.) Nonetheless, although voiding the City and Board orders that revoked Rainey Brothers' permits, the court failed to order the permits reinstated, leaving Rainey Brothers as bad off after receiving this illusory "relief" as it was before. On top of that, the court refused to award any compensation for the impact of these void governmental acts because it erroneously concluded — as a matter of law — that Tennessee's Governmental Tort

Liability Act barred monetary recovery. (App. B., p. 8.)[2] This was a remarkable ruling, considering this Court's determination in *Williamson County* — another case from Tennessee — that Tennessee land owners have an available remedy under state law to compensate for regulatory takings. (*Williamson County*, 473 U.S. at 196.) Thus, in the teeth of admittedly unconstitutional treatment by the City and the Board, Rainey Brothers received no meaningful relief from the Tennessee courts.

Once the state court proceedings were concluded, the matter should have been "ripe" for federal court litigation, as dictated by this Court's decision in *Williamson County*.

Rainey Brothers therefore filed this suit in U.S. District Court, under 42 U.S.C. § 1983, seeking compensation for the denial of its rights to due process and just compensation. Under this Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 305 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as recently confirmed in *Del Monte Dunes*, 119 S.Ct. at 1639, the complete prohibition of Rainey Brothers' use of its property from

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[2] Earlier, the trial court had dismissed Rainey Brothers' amended complaints that sought to clarify its state and federal constitutional claims. The basis for that ruling was the trial court's belief that, under Tennessee law, the amendments would not "relate back" to the date the original complaints were filed because the original complaint failed to give "notice" of these claims to the City and the Board. That conclusion, although affirmed on an interlocutory appeal, *was agreed by all to be an erroneous application of state law*. (App. B, pp. 18-19, fn. 6.) (In their 6th Circuit brief, the City and the Board conceded that the state appellate court had "misinterpreted" Tennessee law. [Final Br. of Appellees, p. 22.]) Because of that ruling, the trial court refused to consider any constitutional compensation for the conceded constitutional violations. The appeal was dismissed by the state appellate court for failure to timely file the transcript. Although the transcript was proffered in response to an order to show cause and thus should have been filed, it is clear that its presence or absence was immaterial. As the state courts had already (erroneously) determined that Rainey Brothers could not amend its complaints to seek constitutional compensation, the result of the appeal was foreordained. The only forum for relief was the U.S. District Court.

the time the City and the Board revoked its permits entitled Rainey Brothers to just compensation for the time that prohibition remained in effect.

Rather than providing compensation for this unconstitutional denial of all economically beneficial or productive use of the subject property, however, the District Court dismissed the action. It accepted the argument of the City and the Board that the concededly error-riddled proceedings in the state courts were *res judicata*, thus precluding Rainey Brothers from ever litigating the merits of its suit — regardless of what this Court may have said to the contrary in *Williamson County*.

In a peremptory fashion, the 6th Circuit affirmed. Thus, this Petition.

SUMMARY OF ARGUMENT

Although undoubtedly well-intentioned, this Court's 1985 decision in *Williamson County* has been a source of intense confusion among lower courts, practitioners, commentators, and litigants. The problem highlighted by this Petition is the prevailing chaos surrounding the relationship between *Williamson County* and the familiar rules of *res judicata* and collateral estoppel. It can be worse than chaos; in many cases, it's a trap. Here's how the *Williamson* trap works:

- *Williamson County* clearly held that a property owner's suit seeking compensation under the 5th Amendment for a regulatory taking or under the 14th Amendment for deprivation of property without due process of law is "premature," and cannot be brought in U.S. District Court "until" the owner first seeks, and is denied, compensation in state court.
- However, when property owners do as *Williamson County* requires and sue in state courts — as Rainey Brothers did at bench — they are met in some Circuits with the argument that the state court litigation, far from "ripening" the federal cause of action, as this Court held

> in *Williamson County*, has instead extinguished it supposedly because the state proceedings are *res judicata*, and that bars the pursuit of the now-"ripened" federal action. Thus, under these courts' reasoning, the very act of "ripening" a case also ends it. That "rule," with all due respect, cannot be what this Court intended in *Williamson County* because it is inherently nonsensical and self-stultifying.

One distinguished law professor put it precisely, if a bit colloquially:

> "One understandable reaction to the prong two requirement of [*Williamson County*] is that it perpetrates a fraud or hoax on landowners. The courts say, 'Your suit is not ripe until you seek compensation from the state courts,' but when the landowner does these things, the court says, 'Ha ha, now it is too late.'" (Roberts, *Ripeness and Forum Selection in Land-Use Litigation* in *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas*, ch. 3 at 67 [ABA, Callies ed., 1996] [hereafter Roberts, *Fifth Amendment*].)

The Circuit Courts are manifestly confused and contradict each other in their approaches to this problem. Some, like the court below, hold that the state proceedings are *res judicata*, so that property owners can *never* achieve the "ripeness" foretold in *Williamson County*. Their belief is that, once the property owner sues in state court, that ends the matter and there can never be any federal litigation.[3] Others have sought to temper the harsh

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[3] See also *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3d Cir. 1989).

impact of issue and claim preclusion rules by permitting the property owner to overtly split a claim by filing a notice in the state court to that effect,[4] or by treating the acquiescence of the state court and the defendant as preserving the issue for federal court litigation.[5]

However, there is no consistency from Circuit to Circuit. The *Williamson* trap came into being as lower courts struggled to understand how this Court's unique requirement that property owners first seek redress in state courts melded with the familiar concepts of claim and issue preclusion. The lower courts have produced no answers — only conflict of decision and doctrinal confusion.

This Court's guidance is urgently needed. Lower federal courts need to know how to apply *Williamson County*. They, and the litigants, need to know definitively whether this Court's statement that federal action is "premature" "until" redress has been sought *and denied* in state court means that property owners can really file suit in U.S. District Court and expect to go to trial on the merits after they have sued and lost in state court. This seems particularly important in a case like this one in which the state court loss was on admittedly *erroneous procedural* grounds, with the state courts never reaching the merits of the dispute,

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[4] *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

[5] *Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995) (*Dodd I*). This was the first of two appeals in *Dodd*. In the second, the 9th Circuit executed what could be viewed as a "bait and switch" maneuver. Acknowledging its earlier holding that the Oregon courts had reserved federal claims for federal court determination (the bait), the 9th Circuit nonetheless held that issues determined in the state court proceedings precluded Mr. and Mrs. Dodd from litigating their federal constitutional claims (the switch). *Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998) (*Dodd II*).

even though the defendants' violations of the Constitution were conceded by them in open court.

One commentator concluded that, ". . . the *Williamson County* . . . ripeness requirements have as often been used by localities as a sword rather than as a shield." (Eagle, *Regulatory Takings*, § 15-4(b)(4), p. 639 [Michie Law Publishers 1996].)[6] This case is the quintessential Exhibit A. Years ago, the City and the Board openly confessed to their constitutional defalcations, yet they have succeeded in evading the constitutionally-mandated remedial consequences of their actions by playing a jurisdictional game. They convinced the state courts to rule in their favor on erroneous procedural — not substantive — grounds, and then convinced the federal courts to preserve that concededly erroneous victory through misapplication of the precept of *res judicata*.[7] It is time to put such shell games to an end, and the only court that can do so is this one. After all is said and done, this situation puts into question the intellectual integrity of the judicial process and, indeed, of this Court's solemn *Williamson County* holding.

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[6] See also Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 98 (1995): "[M]unicipalities may have an incentive to exacerbate this problem [of the delay inherent in "ripening" a case], as stalling is often the functional equivalent of winning on the merits"; DeLong, *Property Matters* 296-298 (Free Press 1997): "The name of this game is transaction costs. . . . [¶] Substantive legal doctrines mean little if you cannot get into court in the first place."

[7] One is reminded of Arthur Train's charming stories about a wily New York lawyer named Ephraim Tutt. In one of them, Mr. Tutt displayed his legal acumen by convincing a federal court to dismiss an indictment of his client on the ground that the state courts had jurisdiction of the matter and then, when his client was indicted by state authorities, had the state court dismiss the case on the ground that the federal courts had jurisdiction. (Train, *Mr. Tutt Plays It Both Ways*, in *Mr. Tutt's Case Book* 413 [Scribners 1945].) The story made for entertaining fiction. However, it makes for a sad commentary on the judicial system when nature imitates such art.

REASONS FOR GRANTING THE WRIT

I

THERE IS CONFLICT AND CONFUSION IN THE LOWER COURTS ABOUT HOW TO RECONCILE THIS COURT'S *WILLIAMSON COUNTY* REQUIREMENT THAT PROPERTY OWNERS "RIPEN" THEIR CONSTITUTIONAL CLAIMS BY SEEKING RELIEF IN STATE COURT BEFORE SUING IN FEDERAL COURT WITH GENERAL PRECEPTS OF *RES JUDICATA* AND COLLATERAL ESTOPPEL

A

This Court's Decision in *Williamson County* Was Clear That Property Owners May Seek Federal Court Redress For Constitutional Violations by Local Government Agencies After Unsuccessfully Seeking Relief in State Court.

One thing that *Williamson County* made clear is that this Court was (a) deciding whether a claim was YET ripe for litigation in federal court and (b) that there were things which first had to be done in state court AFTER WHICH the federal constitutional claims WOULD BE RIPE for federal court.

The Court's analytical section begins with the announced conclusion ". . . that respondent's claim is *premature*." (473 U.S. at 185; emphasis added.) Please note that the word chosen was "premature," not "moribund." Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisdictionally "ripe." The *Williamson County* opinion then goes on to say that, because of the lack of both a final administrative decision and the absence of an attempt to seek compensation in state court, ". . . respondent's claim is *not ripe*." (473 U.S. at 186; emphasis added.) Please note again that the phrase chosen was "not ripe," rather than "dead." Absence of ripeness necessarily means that things need to — and can — be done to make the matter ripe.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of

its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court:

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

Indeed, the plain message of *Williamson County* is that claims that the actions of a local government agency have violated rights protected by the due process and just compensation guarantees of the 5th and 14th Amendments do not even arise until after conclusion of the state court litigation:

> ". . . a property owner has not suffered a violation of the Just Compensation Clause *until* the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation. . ." (473 U.S. at 195; emphasis added.)
>
> "Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' *until* the State fails to provide adequate compensation for the taking." (473 U.S. at 195; emphasis added.)

". . . even if viewed as a question of due process, respondent's claim is *premature*." (473 U.S. at 199; emphasis added.)

The opinion ends as it began, with this conclusion:

"In sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

Thus, *Williamson County* is replete with the twin concepts of "not yet" and "not until." There is no rational way to read *Williamson County* without the realization that the Court anticipated that property owners could satisfy those requirements and render their claim ripe for federal court litigation.

B

Some Lower Courts Have Rigidly and Improperly Applied *Res Judicata* and Collateral Estoppel to Frustrate the Rule of *Williamson County*, While Others Have Recognized This Court's Intent in *Williamson County* and Have Sought Reasonable Ways to Enforce it in Order to Avoid a Wooden Application of Claim and Issue Preclusion Doctrines

In the case at bench, the 6th Circuit held that the state court proceedings were *res judicata*, precluding any federal court litigation, in spite of the uncontested fact that the state courts never considered the merits of any of Rainey Brothers' constitutional claims under either the Tennessee or United States Constitutions. Indeed, because of the state trial court's concededly erroneous application of a Tennessee tort immunity statute,[8] the state courts didn't even consider the merits of non-

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[8] *Felder v. Casey*, 487 U.S. 131, 132, 133 (1988) precludes the interposition of a tort immunity statute between a § 1983 claimant and the courthouse.

constitutional modes of compensating Rainey Brothers for the conceded constitutional violations by the City and the Board.

The 6th Circuit is not without company in its mechanical application of preclusion rules.

Perhaps the most egregious illustration appears in the saga of Mr. and Mrs. Dodd of Oregon. The Dodds purchased 40 acres of land in a secluded area on which they intended to build one home in which to live out their retirement. They were prevented from doing so by the local regulators.[9] Complying with *Williamson County*, they sought redress in state court. In their state court pleadings, Mr. and Mrs. Dodd raised only state law issues, and expressly reserved litigation of their federal claims for federal court. The Oregon courts honored that reservation. (*Dodd I*, 59 F.3d at 857.)

After being denied relief by the state courts (thus fulfilling the *Williamson County* requirement), the Dodds sued in U.S. District Court, where their suit was dismissed based on lack of ripeness. The 9th Circuit reversed. In strong language, it rejected the government's contention that *Williamson County* required the owners to present their 5th Amendment claims to the state courts first, because of the potential impact of *res judicata*:

> "Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result." (*Dodd I*, 59 F.3d at 860-861.)

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[9] This Court may remember the severity of Oregon's regulatory climate from *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Having thus dealt with *res judicata*, or claim preclusion, the court ended on an ominous note by remanding to the District Court for a consideration of collateral estoppel, or issue preclusion, based on the theory that issues had been litigated that could apply to the federal claims as well as the state claims. (*Dodd I*, 59 F.3d at 863.)

Sure enough, on remand, the District Court seized on that statement and found that all the facts had been litigated in state court — as will *always* be the case in a *Williamson County* situation, because there is only a single set of facts by which the local land use regulators either acted arbitrarily toward the land owners or acted in such a way as to take the economically beneficial or productive use of their property — and therefore the matter was barred by collateral estoppel. Having baited the Dodds with its first opinion, the 9th Circuit switched with its second, affirming the dismissal. (*Dodd II*, 136 F.3d 1219.)

Other cases have reached the same Catch-22 result, disregarding *Williamson County's* clear instruction that, once a case had been "ripened" by presenting it to the state courts, it could then be litigated in federal court. (E.g., *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 [10th Cir. 1998]; *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 [9th Cir. 1993]; *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 [3d Cir. 1989].)[10]

Other Circuits have attempted to give meaning to *Williamson County* by concluding that there must be a mechanism by which to modify the normal impact of *res*

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[10] Things have gone so far that a District Court in California, affirmed by the 9th Circuit, has held that there is *no* way for a property owner *ever* to litigate 5th Amendment questions in federal court. It concluded that the upshot of *Williamson County* was that all such litigation must take place in state courts, with recourse to this Court by certiorari being the only possible access to the federal system. (*Hayward Exchange v. City of Oakland*, 1994 U.S. Dist. LEXIS 1421 [N.D. Cal. 1994], *aff'd* 1995 U.S. App. LEXIS 34280 [9th Cir. 1995].)

judicata. The 4th and 11th Circuits, applying a rule developed in a different context by the 5th Circuit, have concluded that property owners can obtain a trial on the merits in federal court if they alert the state court by filing a "reservation" that submits only state law issues while reserving federal issues for a later trial in federal court. (*Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 [11th Cir. 1992]; *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 [4th Cir. 1998]; *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 [5th Cir. 1976].)

Indeed, the 9th Circuit acknowledged the possible utility of such a reservation procedure in *Dodd I*, 59 F.3d at 862, only to take it away in *Dodd II*, 136 F.3d at 1227.[11] The 10th Circuit noted the use made of reservations by the 4th, 5th, and 11th Circuits, as well as the more rigid views of the 3d and 9th Circuits. While disclaiming the need to join one side or the other on the reservation issue, the court expressed this concern about the interface of *Williamson County* and *res judicata*:

> "We do note our concern that *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims. It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson*, 142 F.3d at 1325, fn. 4.)

Whatever the proper resolution of the reservation issue, the fact that several Circuits have adopted such a policy

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[11] In between the two *Dodd* decisions, the 9th Circuit added to the confusion by saying that *Dodd I* "clearly holds that a court can reserve a federal issue so that the issue will not be precluded from further litigation, despite [an] assertion that [a] federal claim will necessarily be precluded by res judicata." (*Macri v. King County*, 126 F.3d 1125, 1130, fn. 7 [9th Cir. 1997].) Without mentioning *Macri*, a different panel reached a contrary conclusion in *Dodd II*, thus rendering the 9th Circuit in conflict with itself on this critical issue.

demonstrates a clear split among the Circuits on how to make *Williamson County* work consistently with the general precepts of claim and issue preclusion. Clarification by this Court is urgently needed.

II

ACADEMICS AND PRACTITIONERS ALIKE AGREE THAT THE INTERFACE BETWEEN *WILLIAMSON COUNTY* AND *RES JUDICATA* IS CONFUSED AND UNJUST

Of all the aspects of regulatory taking law that have been criticized as confusing (and the field has certainly come in for its fair share of such criticism), the ripeness doctrine of *Williamson County* has received the most. And the harshest criticism has been leveled at the requirement that federal claims be "ripened" in state court before presentation to a federal court. A recently-published text calls it "[o]ne of the most confusing aspects of the [*Williamson County*] decision . . . ."[12]

The lower court efforts discussed above have been described as "riddled with obfuscation and inconsistency,"[13] "unclear and inexact,"[14] a "judicially created quagmire" and a "Kafkaesque maze."[15]

The primary target of this criticism is the outright deception of litigants wrought when *Williamson County's* promise

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[12] Laitos, *Law of Property Rights Protection*, § 10.05[A], p. 10-20 (Aspen Publishers 1999).

[13] Testimony of Prof. Daniel R. Mandelker before the House Judiciary Committee, reproduced in full at 31 Urban Lawyer 234, 236 (1999) (hereafter Mandelker testimony).

[14] Meltz, Merriam & Frank, *The Takings Issue* 67 (Island Press 1999).

[15] Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. West. L. Rev. 1, 44, 51 (1992).

of a federal forum is dashed by the application of *res judicata.*[16] That result has been criticized (even by those who think it is appropriate) as "anomalous" and "surprising,"[17] "unpleasant,"[18] and "a trap for the unwary."[19] As Professor Roberts noted:

> "Certainly an anomaly exists: an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It can never be eaten."[20]

Part of the problem has been laid at this Court's doorstep because of its "incomplete exposition,"[21] a conclusion that is certainly apt in this context, as this Court has never explained how *Williamson County* and the rules of claim and issue preclusion relate to each other. However, as one group of academics put it:

> "The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants."[22]

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[16] See Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urban Lawyer 479, 480 (1992) (hereafter Roberts, *Fifth Amendment*): "Reliance on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over." Laitos, *supra*, § 10.05[A][5], p. 10-25: "This unfortunate result has produced an outcry from litigants who incorrectly assumed that compliance with [*Williamson County*] would eventually give them their day in federal court."

[17] Roberts, *Ripeness and Forum Selection* at 65.

[18] Roberts, *Fifth Amendment* at 480.

[19] Meltz, Merriam & Frank, *supra* at 67.

[20] Roberts, *Ripeness and Forum Selection* at 68.

[21] Stein, *supra*, 48 Vand. L. Rev. at 4.

[22] Mandelker, Gerard, & Sullivan, *Federal Land Use Law* § 4A.02[6] at p. 4A-21 (Clark, Boardman, Callaghan 1998).

Unfortunately, regardless of this Court's intent, a trap is what the rules have become. As exemplified by this case, once property owners submit their claims to state courts, their risk of never seeing the inside of a federal courthouse (except for purposes of being dismissed therefrom) is high. In testimony before Congress, Professor Mandelker, one of the elder statesmen in this field, testified that his extensive review of the lower federal court decisions showed a "wholesale abdication of federal jurisdiction in law suits where issues are raised concerning the constitutional validity of land use regulation" because "federal judges have distorted the Supreme Court's ripeness precedents to achieve [the] undeserved and unwarranted result [of] avoid[ing] the vast majority of takings cases on their merits."[23]

Even specialized scholars and informed attorneys are confused. The present rule — or, more accurately, non-rule — "sometimes catches even the most careful and vigilant."[24] Thus, while one keen observer concludes that "[t]his bar to the federal courts is almost complete,"[25] others optimistically opine that "a litigant with a Federal takings claim is not denied access to Federal court, but simply must pursue available State remedies *before* going to Federal court."[26] This optimism is unwarranted as at least four Circuits take a diametrically opposite view.

This Court's attention to this problem is critical. It exists because *Williamson County* created a unique litigational path for land use disputes raising federal constitutional questions by requiring a detour through the state courts. Surely, the resulting

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[23] Mandelker testimony, 31 Urban Lawyer at 236, 237.

[24] Meltz, Merriam & Frank, *supra*, p. 67.

[25] Roberts, *Fifth Amendment*, 24 Urban Lawyer at 480.

[26] Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urban Lawyer 177, 187 (1999); emphasis added (quoting the Senate Judiciary Committee Minority Report on H.R. 1534).

jurisprudential mess cannot have been intended. Without this Court's guidance, the situation cannot improve; it can only get worse. The lower courts are irreconcilably split, the commentators see nothing but confusion, and innocent litigants are trapped in the middle. When, as at bench, the constitutional violation is conceded by the municipal wrong-doers, the idea of shuffling the victims through a costly litigational maze, at the end of which they are unceremoniously put out on the street, is repugnant to civilized concepts of justice.

III

IF, UNDER *WILLIAMSONCOUNTY*, PROPERTY OWNERS ARE TO BE SINGLED OUT AS THE ONLY CONSTITUTIONAL CLAIMANTS WHO MUST "RIPEN" THEIR FEDERAL CLAIMS IN STATE COURTS, CONCEPTS OF CLAIM AND ISSUE PRECLUSION NEED TO BE APPLIED IN SUCH A WAY THAT *WILLIAMSON COUNTY*'S PROMISE OF AN EVENTUAL FEDERAL HEARING IS PRESERVED

In one of its recent land use cases, this Court expressed its philosophy toward enforcing the protections of the Bill of Rights as follows:

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].)

That philosophy requires additional support from this Court to make it real.

A

Property Owners Complaining of 5th and 14th Amendment Violations Are the Only Ones Required to Run a State Court Litigational Gauntlet Before They May Seek Relief From a U.S. District Court

At this time, property owners' 5th Amendment rights *de facto* remain "a poor relation" to others in the Bill of Rights. Although people who are prosecuted in state courts may be required to raise their federal constitutional defenses on pain of losing their ability to litigate them later (e.g., *Allen v. McCurry*, 449 U.S. 90 [1980]), and the same may be true of those who actively seek recompense under the aegis of state law in state courts (e.g., *Migra v. Warren City School Dist. Bd.*, 465 U.S. 75 [1984]), no other federally protected rights have the *Williamson County* precondition to federal litigation.

First Amendment cases abound, for example, in which the validity of local land use ordinances regulating sexually explicit work has been challenged in federal court. (E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 [1986]; *Young v. American Mini Theatres*, 427 U.S. 50 [1976].) There is no requirement of first presenting the issues to state courts, even though the courts are required to apply "contemporary community standards."

Similarly, First Amendment cases dealing with the establishment of religion are litigated in federal courts in the first instance, without any required stopover in state courts, even when they implicate land use issues. (E.g., *Larkin v. Grendel's Den*, 459 U.S. 116 [1982]; *First Assembly of God v. Collier County*, 20 F.3d 419 [11th Cir. 1994].) The same is true of cases focussed on education, where questions of religious involvement are decided by federal courts without any assistance from state courts. (E.g., *Wallace v. Jaffree*, 472 U.S. 38 [1985]; *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 [1985]; *Abingdon School Dist. v. Schemp*, 374 U.S. 203 [1963].)

In *Monroe v. Pape*, 365 U.S. 167 (1961), the federal courts reviewed James Monroe's claim that the Chicago police had violated his 4th Amendment rights, and did so without requiring him first to seek relief in state court. Likewise, as to claims of racial segregation. (*McNeese v. Board of Education*, 373 U.S. 668 [1963].)

Not to belabor the obvious, the cases cited above deal with parallel features of the Bill of Rights, protected in court through 42 U.S.C. § 1983. Just like the rights that Rainey Brothers sought to protect here. The difference is that the plaintiffs in the other cases were able to proceed directly to U.S. District Court to seek redress for alleged violations of their federally protected rights. But not Rainey Brothers. Unlike all the rest, Rainey Brothers (and all other property owners seeking the same kind of protection) was required to go first to state court in order to "ripen" its federal claim.[27]

If, as this Court said in *Dolan*, rights protected by the property clauses of the 5th and 14th Amendments are not to be "relegated to the status of a poor relation," then one of two things needs to happen: either *Williamson County* needs to be reconsidered, or the concepts of claim and issue preclusion need to be reconciled with it in a manner that preserves the state court "ripening" process while also preserving the aggrieved citizens' rights, as well as federal court jurisdiction to determine the validity of their constitutional claims. By forcing property owners to proceed through a hopeless morass of state court procedures — which ensure, through *res judicata*, that they will never see the inside of a federal courthouse — the "poor relation"

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[27] Kassouni, *supra*, 29 Cal. West. L. Rev. at 2: "The net result is a special ripeness doctrine applicable only to constitutional property rights claims." See also Delaney & Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urban Lawyer 195, 198 (1999); Stein, *supra*, 48 Vand. L. Rev. at 13-14; Fischel, *Regulatory Takings* 55 (Harvard U. Press 1995).

status of their constitutional protection is guaranteed.[28]

B

Because of the Importance This Court Has Always Placed on the Ability of Constitutional Plaintiffs to Have Access to Federal Courts, a Mechanical Application of Ordinary Precepts of Claim and Issue Preclusion Should Not be Used to Bar the Courthouse Doors After Property Owners Comply With the "Ripeness" Requirements of *Williamson County*, Because That Makes This Court's Holding Self-Stultifying

Both before and after *Williamson County*, this Court's cases have been uniform that suits seeking redress under 42 U.S.C. § 1983 belong in federal court, regardless of the possibility of obtaining relief in state court, because federal courts are uniquely suited and intended to adjudicate federal issues.

Section 1983 was intended to provide "a uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 [1972]) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 [1972] [quoting with approval]) so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]). While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader " (*Kalina v. Fletcher*, 522 U.S. 118, 123 [1997]), and must be broadly and liberally construed to achieve its goals (*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 [1989]; *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 [1979]). "[T]he central purpose of the Reconstruction-Era laws is to

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[28] This is no advocate's hyperbole. Here, Rainey Brothers was forced through a state court system which repeatedly erred in denying relief (as belatedly conceded by the defendants in their 6th Circuit brief [pp. 12, 22, 30]) and then the District Court set those errors in constitutional concrete by declaring them *res judicata* in this section 1983 suit because procedural errors, he said, were *on the merits*.

provide compensatory relief to those deprived of their federal rights by state actors" (*Felder v. Casey*, 487 U.S. 131, 141 [1988]) by "***interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights***" (*Mitchum*, 407 U.S. at 243; emphasis added).[29]

On several occasions, this Court has examined the background of section 1983. In its seminal decision in *Monroe*, for example, after an exhaustive discussion, the Court concluded:

> "The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford *a federal right in federal courts* because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (*Monroe*, 365 U.S. at 180; emphasis added.)
>
> "It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.*" (*Monroe*, 365 U.S. at 183; emphasis added.)

The same theme appears in *McNeese v. Board of Education*, 373 U.S. 668, 671-672 (1963).

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[29] It cannot be overemphasized that the rulings below crudely obvert this rule and, in fact, interpose state, not federal, courts between the Constitution and the citizens seeking its enforcement. With all due respect, this gives rise to a *sub rosa* resuscitation of the "interposition doctrine" that raised its head briefly in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), only to be interred in *Cooper v. Aaron*, 358 U.S. 1 (1958).

In *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982), this Court again examined the Congressional debates preceding the adoption of section 1983, and concluded that Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts* . . . ." (Emphasis added.)

If, as this Court has repeatedly held, Congress intended for section 1983 plaintiffs to have their cases tried in federal courts if they so opted, then some accommodation of the general standards for claim and issue preclusion seems mandated. Otherwise, the law — at least as seen by the courts below — would create a class of constitutional pariahs who may never litigate their federal constitutional claims in federal court. *Williamson County* segregates this one type of section 1983 litigation and, instead of providing "immediate access to the federal courts," requires a "ripening" procedure that, as construed below, absolutely precludes access to the federal courts. As Professor Laitos put it recently:

> "The combined effect of [*Williamson County*], res judicata, collateral estoppel, and the full faith and credit statute is to make a takings claim moot, and precluded, if a property owner takes all the necessary steps to make the claim ripe." (Laitos, *supra*, § 10.05[A][5], p. 10-25.)

That cannot have been the intent of a Congress that sought to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." (*Mitchum*, 407 U.S. at 243.)

If state court litigation legally precludes section 1983 plaintiffs from being heard in federal court, then constitutional plaintiffs are at the mercy of state courts in molding their federal claims. But this Court's jurisprudence forbids that sort of power to the states. After all, this litigation is all about *federal* rights.

As noted earlier, one of the purposes of section 1983 was to provide a federal remedy where the state remedy, "by reason of prejudice, passion, *neglect*, intolerance *or otherwise*" (*Monroe*, 365 U.S. at 180; emphasis added) was not enforced. That is this case in spades.[30]

Nonetheless, the courts below felt compelled to honor the concededly deficient Tennessee decisions because, in Tennessee, procedural motions to dismiss are treated as being on the merits. This eliminated any chance of Rainey Brothers' claim ever being considered on its actual merits. That violates this Court's repeated admonition that state courts cannot be granted the power to define federal claims:

> "'Congress,' we have previously noted, 'surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.'" (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting with approval from *Wilson v. Garcia*, 471 U.S. 261 [1985].)

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[30] The infirmity of the state court judgment militates against giving it any preclusive effect. Where the party against whom the judgment was entered did not have a "full and fair opportunity" to litigate the facts or where, for some other reason, there is reason to doubt the quality, extensiveness, or fairness of the procedures followed, then "full faith and credit" is not warranted. (*Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480 [1982]; *Allen v. McCurry*, 449 U.S. 90, 95 [1980]; *Montana v. United States*, 440 U.S. 147, 153 [1979].) Here, not only did the District Court find that the state courts "were simply wrong" in their conclusions (App. B, p. 18), the City and the Board conceded the same thing in their 6th Circuit brief (pp. 12, 22, 30), thereby conceding their own complicity in convincing the state courts to wrongly insulate them from liability. The "process" that Rainey Brothers received in the Tennessee courts was anything but "due process." Respectfully, it wasn't even a good caricature of due process. It cannot bar this litigation and yet be consistent with a principled adjudication process.

It is one thing for this Court to invoke a rule of prudential ripeness (see *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 733-734 [1997]), and ask state courts to determine the extent of the remedies they offer under the circumstances. It is something quite different to overlay doctrines of claim and issue preclusion on the state courts' answers, and thereby enable states to prevent access to federal courts contrary to *Williamson County*, where this Court repeatedly noted how the case was simply "not yet" ripe for federal determination. By granting preclusive effect to either the entire claim presented to the state court or to discrete issues litigated there, the interpretation of *Williamson County* by the 3d, 6th, 9th, and 10th Circuits presented here for review flies in the face of settled section 1983 jurisprudence.[31]

This Court has had extensive experience with the relationship between state and federal courts in a different, yet analogous, field: federal habeas corpus petitions. Habeas petitioners are required to present their federal constitutional issues to the state courts before seeking federal court relief, on the ground that state courts ought to be given the opportunity to correct their own constitutional violations before they are brought before a federal court. (*Picard v. Connor*, 404 U.S. 270, 275 [1971].) The requirement to repair first to the state courts (and to present there all of the federal constitutional issues that will eventually be raised in U.S. District Court) is not jurisdictional (*Castille v. Peoples*, 489 U.S. 345, 349 [1989]), but it is nonetheless required (*O'Sullivan v. Boerckel*, 119 S.Ct. 1728 [1999]).

But, having presented all of the federal constitutional issues to the state court for adjudication, and having received an unfavorable response, is the habeas corpus petitioner subjected to

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[31] The availability of a petition for certiorari to this Court after conclusion of the state court proceedings is, as this Court has said, "an inadequate substitute" for trial in a U.S. District Court, because "[h]ow the facts are found will often dictate the decision of federal claims." (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 416 [1964].)

res judicata and full faith and credit arguments upon arriving in federal Court? Of course not. This Court put it as plainly as could be in *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977): "It is *not* res judicata." (Emphasis added.) If being required to submit *federal* constitutional issues to a state court for review does not preclude later federal examination of those *same* issues, then *a fortiori*, the forced submission of *state* constitutional issues to a state court should not, indeed cannot, logically preclude later adjudication of *federal* constitutional issues by a federal court in this 5th and 14th Amendment context.

There is no intellectually defensible reason why property owners in section 1983 cases, and they alone, should be confronted with the bar of *res judicata* when they seek to enter the federal courthouse doors that were supposedly "thrown open" to them by section 1983 (*Patsy*, 457 U.S. at 504) so that they could litigate their federal claims in a federal forum.

With respect, the confusion now reigning below on how to apply *Williamson County*, and particularly how to reconcile it with general doctrines of preclusion cries out for this Court's intervention. Decisions like the one below, concluding that the only thing such a case is "ripe" for is dismissal, cannot have been the intent of *Williamson County's* ripeness doctrine. As a group of respected law professors put it, this "Court could hardly have intended the ripeness rules to become a trap for federal litigants." (Mandelker, Girard & Sullivan, *supra*, § 4A.02[5][e], p. 4A-21.) But a trap they have nonetheless become. Examination of *Williamson County's* interaction with rules of claim and issue preclusion is badly needed.

CONCLUSION

> "The ripeness rules developed by the courts have caused hardship to property owners who seek court access so their constitutional claims can be heard. *Williamson County* and its progeny should no longer be misused to block takings cases where concrete and ascertainable injuries flow from final land use decisions."
> (Mandelker testimony, 31 Urban Lawyer at 253.)

In the fourteen years since this Court decided *Williamson County*, the lower courts have created a procedural and jurisdictional mare's nest that serves only to place traps in the way of property owners who are trying to follow the rules and "ripen" their constitutional claims for federal court litigation as prescribed by this Court. The case at bench perfectly illustrates the problem because *confessed constitutional wrong-doers* have managed to manipulate the state and federal judiciaries into denying relief in both systems. Whatever one wants to call that, it is not due process, nor even rudimentary justice. It is a triumph of conceded wrong-doing over constitutional guarantees, and this Court should have no part of it.

Instead of creating workable rules for litigating regulatory taking cases, including rules for "ripening" them through state court litigation, the current system has produced only chaos. The chaos is highlighted by the fact that the 3d, 6th, 9th, and 10th Circuits adhere strictly to the belief that the state court "ripening" process causes perfectly valid federal claims to become barred at the very moment they become ripe for federal litigation, while the 4th, 5th, and 11th Circuits have devised reasonable ways to provide a federal forum in which to litigate the ripened cause of action. Both approaches cannot be right. Citizens' constitutional rights should not vary with their residence. In a principled jurisprudence, geography should not be destiny.

Rainey Brothers prays that Certiorari be granted, that this Court resolve the rampant conflict of decisions, that it clarify the

widely misunderstood effects of its *Williamson County* holding, and that it civilize the law so that these conceded constitutional injuries may finally be adjudicated on the merits. As constitutional liability has already been conceded, the trial on remand would relate solely to compensation.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION
No. 97-5897
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Rainey Brothers Construction Company, Inc. *Plaintiff-Appellant,*	)	**On Appeal From The United States District Court For The Western District of Tennessee**
v.	)	
Memphis and Shelby County Board of Adjustment; and City of Memphis, Tennessee *Defendants-Appellees.*	)	

6th Circuit Court of Appeals Filed 4/5/99 Leonard Green, Clerk

Before: **SILER, BATCHELDER, and COLE,** Circuit Judges.

PER CURIAM. Plaintiff Rainey Brothers Construction Company, Inc. ("Rainey") appeals the district court's grant of summary judgment in favor of the defendants, Memphis and Shelby County Board of Adjustment (the "Board") and the City of Memphis. Rainey brought a § 1983 action against the defendants, asserting substantive and procedural due process claims and inverse condemnation and takings claims in connection with the Board's revocation of a zoning variance. The district court held that a prior state court judgment had preclusive res judicata effect. As set forth below, we AFFIRM the judgment of the district court.

Not recommended for Full-Text Publication - Sixth Circuit Rule 206 limits citation to specific situations. Please see Rule 206 before citing in a proceeding in a court in the Six Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BACKGROUND [1]

In 1976, Rainey simultaneously brought two actions, one seeking an injunction and another seeking money damages, in a Tennessee state court against the defendants, alleging that the Board had acted arbitrarily and capriciously when it revoked construction permits previously issued to Rainey. For the next twelve years, neither side took any action.

Then, in 1988, Rainey filed amended complaints and later filed second amended complaints in both actions. The amended complaints added specific claims for inverse condemnation under Tennessee state law, a takings claim under the federal constitution, and substantive and procedural due process claims under the state and federal constitutions. The defendants filed a motion to dismiss the second amended complaints on the grounds that they contained new causes of action that did not relate back to the date of the original complaint. The trial court dismissed the second amended complaint in each action pursuant to TENN. R. CIV. P. 12.02(6), holding that the claims did not relate back under TENN. R. CIV. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. Rainey filed an interlocutory appeal.

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[1] The facts of this case are stated in the district court's opinion, *Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F.Supp. 998 (W.D. Tenn. 1997). However, a brief summary of the relevant facts is provided herein.

The Tennessee Court of Appeals affirmed the dismissals, finding that the second amended complaints raised several new claims that did not relate back to the date of the original pleading:

> Given the fact that the defendants were not on notice from their original pleadings that they may have to defend these claims, the amendments do not relate back to the original pleadings and given the fact that the amendments were filed over 12 years after the original pleadings, the defendants would be unfairly prejudiced if they were made to defend these new causes of action.

Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 821 S.W.2d 938, 942 (Tenn. Ct. App. 1991). Rainey was denied permission to appeal to the Tennessee Supreme Court and by the United States Supreme Court.

In 1994, a non jury trial began on Rainey's original claims. The trial court found that the defendants had violated Rainey's constitutional rights and that the Board's decision revoking the construction permits was capricious, arbitrary and illegal. However, the court determined that Rainey's claim for money damages was barred by the Tennessee Governmental Tort Immunity Act. *See* TENN. CODE ANN. § 29-20-205. The Tennessee Court of Appeals dismissed Rainey's appeal on the grounds that Rainey had failed to timely file a transcript in accordance with Tenn. R. App. P. 24(b). The Tennessee Supreme Court denied permission to appeal.

In 1996, Rainey filed this action in federal court under 42 U.S.C. § 1983, asserting the same claims which had been dismissed by the Tennessee courts. The district court granted summary judgment in favor of defendants, holding that the state court judgment had preclusive res judicata effect, even though the state courts erroneously applied the law.

DISCUSSION

Rainey argues that it was a victim of the *"Williamson* Trap." It claims that, in the course of ripening its claims in state court, as it was required to do under *Williamson Cty. Reg'l Planning Comm 'n. v. Hamilton Bank*, 473 U.S. 172 (1985), it was unconstitutionally deprived of federal remedies by erroneous state court holdings which were subsequently given res judicata effect by the district court. Rainey argues that the Tennessee state courts purposefully prevented it from presenting the merits of its claims and denied it a "full and fair opportunity" to litigate its federal and state constitutional claims by applying procedural rules in an "unequal, shallow and fundamentally unfair manner."

Rainey's arguments are without merit. In *Dyer v. Intera Corp.*, 870 F.2d 1063, 1066-1067 (6th Cir. 1989), we held that a Tennessee court's dismissal of a state action pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief could be granted was a decision on the merits which had preclusive effect in a federal court action raising the same claims. Here, the Tennessee state court dismissed Rainey's claims under Rule 12.02(6) because its additional claims did not relate back as required by Rule 15.03. Relying on *Dyer*, the district court held that the state court decision was indeed a decision on the merits

and entitled to preclusive res judicata effect. Rainey attempts to distinguish *Dyer* by making a subtle distinction between the procedural background of *Dyer* and the procedural background in this case. Although the claims in *Dyer* and the claims in the present case were dismissed under Rule 12.02(6), Rainey argues that whereas the state court decision in *Dyer* was a decision "on the merits" because the state court addressed the substance of the claims, the state court decision in the present case was not "on the merits" because the courts never analyzed the substance of its claims. Rainey does not cite any case law to support such a distinction. Moreover, the district court's conclusion that the state court decision was on the merits is supported by the language of Civil Rule 41.02(3), which states:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for lack of an indispensable party, operates as an adjudication upon the merits. (Emphasis added.)

Dyer, 870 F.2d at 1066 (relying on the language of Rule 41.02(3) to support its conclusion that a Rule 12.02(6) dismissal was a decision on the merits). Hence, the district court did not err in concluding that the state court's Rule 12.02(b) dismissal was a decision on the merits.

Additionally, Rainey claims that res judicata should not apply because it did not have a "full and fair opportunity" to litigate its constitutional claims. *See Kremer v. Chemical Constr.*

Corp., 456 U.S. 461 (1982). Rainey claims it did not have such an opportunity due to the Tennessee courts' erroneous application of the relation-back doctrine. While the district court agreed that the state courts had erroneously applied the relation-back doctrine, it recognized that a state court's misapplication of its own law was not a legitimate basis for avoiding the application of res judicata principles. Rainey places a great deal of emphasis on *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979), and also on *Kremer*, 456 U.S. at 481, in which the Court stated that "[r]edetermination of issues is warranted if there is a reason to doubt the quality, extensiveness, or fairness of the procedures followed in prior litigation." However, Rainey misconstrues the statement from *Montana and Kremer*. The Supreme Court did not intend for parties to be able to bring a § 1983 action re-asserting the same claims every time there was evidence that a state court misapplied its own law in a prior adjudication. Rather, the Court defined the content of the "full and fair opportunity" requirement by stating that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Thus, as long as a state's procedures were constitutionally sufficient, the fact that a state court may have erroneously applied its own law does not mean that it denied a plaintiff's full and fair opportunity to litigate its claims. As stated by the district court:

> [T]his is not a case where the state had employed a procedural rule to thwart federal rights in a systemic fashion. Indeed, as plaintiff argues, the state courts were

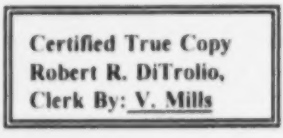
> simply wrong in their holding that plaintiff could not amend its pleadings to assert its federal claims. That the state courts were wrong, however, does not empower this Court to review such a decision. To hold otherwise would require federal district courts to review all state court decisions that dismissed any federal claims on a procedural ground. For obvious reasons, the Court declines to transform the federal district courts into state appellate courts.

Rainey Bros. Constr. Co. v. Memphis and Shelby County Bd. of Adjustment, 967 F.Supp. 998, 1005-06 (W.D. Tenn. 1997) (citations omitted). We agree.

Affirmed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Rainey Brothers Construction Company, Inc. *Plaintiff-Appellant,*	)	
v.	)	
	)	**Case No. 96-3156**
Memphis and Shelby County Board of Adjustment; and City of Memphis, Tennessee *Defendants-Appellees.*	)	**M1-V**



ORDER GRANTING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

This matter is before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment, filed November 25, 1996. Because the defendants have submitted and the Court has considered matters outside of the pleadings, the Court will treat defendants' motion as a motion for summary judgment.[1]

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[1] In its memorandum in opposition to defendants' motion, plaintiff argues, inter alia, that Exhibits A through O attached to defendants' motion may not be considered by this Court in resolving defendants' motion because such materials are--outside the scope of materials allowed under Fed. R. Civ. P. 56 and Local Rule 11(d)(2). Rule 56(a) provides that only affidavits,

See Fed. R. Civ. P. 12(b). For the reasons set forth below, defendant's motion is GRANTED.

BACKGROUND

This case is the culmination of a long standing land dispute between plaintiff, Rainey Brothers Construction Company, Inc., and defendants, the Memphis and Shelby County Board of Adjustment (the "Board") and the City of Memphis (the "City"). The property in question is a fourteen (14) acre tract of land located at the intersection of Helene and Vera Cruz streets, known as 5261 Helene, in Memphis, Shelby County, Tennessee. The property is bounded on the south by Interstate I-240, on the north by Helene Avenue and the East Memphis Catholic Club, on the west by an open concrete lined ditch, and on the east by residences that face away from the property.

On February 3, 1964, plaintiff presented a preliminary plan to develop single-family houses on the property to City officials but was told that the minimum building elevation had been increased. Because raising the minimum building elevation

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pleadings, depositions, or answers to interrogatories may be considered and relied upon by a court in considering a motion for summary judgment. Fed. R. Civ. P. 56(a). According to plaintiff, "even if [defendants' exhibits] were past orders and pleadings, they are not verified and are not self-authenticating." This issue was raised by the Court at a hearing held on January 21, 1997, at which plaintiff stipulated to the authenticity of the documents. Accordingly, this issue is now moot.

made it economically unfeasible to build single-family houses on the property, plaintiff then sought R-4 apartment zoning in order to construct 432 units of two (2) story apartments on the property. This request was rejected by the City's Planning Commission, and, on appeal, this decision was upheld by the City Commission.

Subsequently, the City Commission approved the property for R3A zoning, effective December 29, 1967, which would have allowed plaintiff to build 244 apartments on the property. Relying on this zoning change, plaintiff applied to the City Building Department for a building permit. The City's mayor, however, instructed the City's Building Department not to issue a building permit for the construction of the 244 apartments on the property. Consequently, on January 16, 1968, the City's Building Official notified plaintiff that the City would not issue a building permit to construct apartments on the property.

In response, plaintiff then requested that the Board grant it permission to construct 165 apartments on the property. The Board approved this request but required that the apartments be constructed at an elevation of 274.9 means sea level ("msl"). Once again, the Mayor expressed his opposition to the construction of the apartments, requesting that the Board reconsider its approval. This time, however, the Board reaffirmed its approval of the construction.

Then, relying on a decision of the Tennessee Supreme Court, Glankler v. City of Memphis, 481 S.W.2d 376, 378 (Tenn. 1972) ("The Board of Adjustment of the City of Memphis is an administrative body which enjoys a wide latitude and great discretion in the granting of variances from the zoning regulations when it finds that such regulations impose unnecessary restraint or hardship. It is not an unlawful delegation of authority to confer on such a board jurisdiction to hear and determine appeals.") Plaintiff requested that the Board grant a hardship variance to lower the minimum fill elevation from 274.9 msl to 270 msl. On August 29, 1975, the Board, acting in executive session, granted plaintiff's requests for a hardship variance and lowered the minimum fill elevation on the property from 274.9 msl to 270 msl; the Board, however, did not hold a public hearing or give notice to interested parties of plaintiff's request for a variance.

After obtaining the variance, plaintiff waited over sixty (60) days to see if any appeal or action challenging the variance would be filed, as provided in the City's Charter and applicable state statute. Because no appeal or other challenge was filed within the 60 day period, plaintiff began obtaining all necessary permits and contracting with various engineers, materialmen, suppliers, and plumbers in furtherance of construction. Plaintiff also obtained approvals from the City's Plumbing Department and revised its sewer plans. Inspections of the property were made by the City's Building Department. Slabs where then placed in position after receiving approval and financing. Construction was well into the framing stage by April 1976.

On April 7, 1976, some seven (7) months after the Board's August 29, 1975 action, an attorney representing certain objectors sent notice to the Board, complaining about the action. Subsequently, on April 28, 1976, the Board rescinded the August 29, 1975 action, revoked the variance, and reinstated the original building elevation of 274.9 msl. All of this action was taken without any notice to plaintiff and without giving plaintiff any opportunity to appear or to be heard. According to plaintiff, the change in the minimum building elevation required that it tear down the construction already completed, fill the property to the minimum building elevation of 274.9 msl, and rebuild at significant expense. Plaintiff, however, did not take these steps.

Instead, plaintiff petitioned for a rehearing at the next meeting of the Board, scheduled for May 26, 1976. This request, however, was denied. Subsequently, on September 30, 1976, without any notice or any opportunity to be heard, the City's Building official canceled and revoked plaintiff's construction and other permits. Plaintiff contends that this constituted a final decision by the Board and the City.

On May 27, 1976, plaintiff simultaneously filed two (2) actions in state court. The first action, Case No. 53654 R.D.-8

("Rainey I"), sought review of the Board's April 28, 1976 action via certiorari, in which plaintiff sought an injunction superseding the action of the Board and preventing the City's Building Department from enforcing the Board's decision. Plaintiff also prayed for "such other, further and general relief to which it may be entitled in the premises and as the proof may

show to be necessary and the circumstances require." In essence, plaintiff argued that it had taken numerous steps, expended significant sums, and executed notes in reliance on the Board's August 27, 1975 action lowering the building elevation to 270 msl and that the Board's April 28, 1976 decision was illegal, ultra vires, without jurisdiction, arbitrary and capricious (and therefore a deprivation of substantive due process), and had caused Rainey Brothers great financial and economic harm.

The second action, Case No. 73473.-8 T.D. ("Rainey II"), sought money damages resulting from the Board's April 28, 1976 decision. As in Rainey I, plaintiff asserted that it had relied on the Board's decision to lower the building elevation to 270 msl and, as a result, had expended significant sums and had executed various notes. Moreover, plaintiff alleged that as a result of that decision, it was required to tear down the construction already completed, to fill the property to 274.9 msl, and rebuild at significant expense.

Incredibly, during the next 12 years, there was apparently no action taken in the cases. According to plaintiff, none of the defendants filed any responsive pleading or answer to either complaint during this time. At the same time, plaintiff never moved for entry of default or a default judgment. Finally, on November 14, 1988, plaintiff filed an amended complaint in each action. The amended complaints added specific claims for inverse condemnation under Tennessee state law, Tenn. Code Ann. § 29-16-123, a takings claim under the federal constitution, and substantive and procedural due process claims under the state and federal constitutions. In addition, the amount of damages

sought was increased significantly. Subsequently, plaintiff sought leave to file a second amended complaint in each action. Leave to file was granted by the trial court, and, on March 8, 1989, plaintiff filed second amended complaints in each action.

On March 21, 1989, defendants moved to dismiss the second amended complaints on the grounds that the amended complaints contained new causes of action that were barred by the applicable Tennessee statutes of limitations because they did not relate back to the date of the original complaint. On August 2, 1989, the trial court dismissed the second amended complaint in each action pursuant to Tenn. R. Civ. P. 12.02(6), holding that these claims did not relate back under Tenn. R. Civ. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. The trial court, however, did grant plaintiff's motion for leave to file an interlocutory appeal from each order of dismissal.

On interlocutory appeal, the Tennessee Court of Appeals affirmed the dismissals, finding that the second amended complaints raised several new claims and did not relate back to the date of the original pleading:

> Given the fact that the defendants were not on notice from their original pleadings that they may have to defend these claims, the amendments do not relate back to the original pleadings and given the fact that the amendments were filed over 12 years after the original pleadings, the defendants would be unfairly prejudiced if they were made to defend these new causes of action.

Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 821 S.W.2d 938, 942 (Tenn. Ct. App. 1991). Plaintiff's request for permission to appeal to the Tennessee Supreme Court was denied. Plaintiff's petition for a writ of certiorari to the United States Supreme Court was also denied.

On April 25, 1994, a non-jury trial began in the Circuit Court of Shelby County, Tennessee. On the first day of the trial, the City Attorney, representing the City and the Board, stipulated in open court that the Board and the City had acted arbitrarily, capriciously, and illegally when it restored the 274.9 msl building elevation without any notice to plaintiff and without providing any opportunity for plaintiff to be heard or object. In essence, defendants stipulated that they had violated plaintiff's rights under both the Tennessee and United States Constitutions.

On May 17, 1994, the trial court entered an order, holding that the City and the Board had violated plaintiff's constitutional rights, and, therefore, the April 28, 1976 decision of the Board was "void, capricious, arbitrary and illegal and therefore reversed." Despite this finding, the trial court found that plaintiff's money damage claim in Rainey II was "barred by the general immunity afforded to a municipality and specifically, by the language in Tenn. Code Ann. § 29-20-205."

On May 27, 1994, plaintiff filed a notice of appeal, in which it sought review of the dismissal of its damage claim. On April 7, 1995, because plaintiff had not filed a transcript in

accordance with Tenn. R. App. P. 24(b),[2] the Tennessee Court of Appeals filed an order to show cause why the appeal should not be dismissed for failure to comply with the Tennessee Rules of Appellate Procedure. On April 18, 1995, the Tennessee Court of Appeals dismissed the appeal, finding that plaintiff had not shown good cause for its failure to file the transcript. See H. D. Edgemon Contracting Co. v. King, 803 S.W.2d 220, 223 (Tenn. 1991) (holding that "the 90-day requirement set forth in Rule 24 is reasonable and fair and in the absence of "good cause" being shown, the rule must be enforced").

On September 11, 1995, the Tennessee Supreme Court denied plaintiff's application for permission to appeal. Plaintiff then moved for reconsideration, and, on November 6, 1995, the Tennessee Supreme Court denied that motion as well. On November 5, 1996, plaintiff filed an action under 42 U.S.C. § 1983 in this Court, seeking to assert a substantive due process claim, a procedural due process claim, and an inverse condemnation or takings claim. On November 25, 1996, defendants responded to the complaint by filing a motion to dismiss or, in the alternative, for summary judgment on the grounds that plaintiff's claims were barred by the doctrine of res judicata. On December 27, 1996, plaintiff filed a response, and on February 4, 1997, the Court heard argument on defendant's motion.

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[2]Rule 24(b) provided that "the transcript . . . shall be filed with the clerk of the trial court within 90 days after filing the notice of appeal." Tenn. R. App. P. 24(b).

STANDARD OF REVIEW

Under Rule 56 (c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Pursuant to Rule 56 (e), when confronted with a properly supported motion for summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but his" response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. In considering a motion for summary judgment, however, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion."Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986).

DISCUSSION

Defendants move for summary judgment on the grounds that the claims raised by plaintiff in its complaint have been previously decided against them in state court and are, therefore, res judicata between the parties. Under the Full Faith and Credit

Act, 28 U.S.C. § 1738, "a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." Parsons Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523 (1986); accord Migra v. Warren city Sch. Dist. Bd., 465 U.S. 75, 83-84 (1984) (holding that, even in an action brought under § 1983, a federal court must give preclusive effect to issues that were actually litigated or could have been litigated in a prior state court proceeding). A federal court can refuse to accord preclusive effect to a state court judgment, however, if application of the state preclusion law would violate due process. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment."). Due process is violated if a litigate did not have a full and fair opportunity to litigate his claims. Id. at 480-81.

Under Tennessee law, a previous action is given preclusive res judicata effect if: (1) the underlying judgment was rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; and (4) the underlying judgment was on the merits. Lee v. Hall, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990); Hutcheson v. Tennessee Valley Auth. 604 F. Supp. 543, 550 (M.D. Tenn. 1985); 22 Tenn. Juris. Res Judicata §§ 8-11 (1985). Applying these standards to the instant case, there is no real dispute that the traditional elements of res judicata have been established.

Specifically, it is beyond dispute that the Tennessee state courts have jurisdiction to hear federal statutory and constitutional claims. Nor is there any dispute that the same parties involved in this case were also parties to the state court action. Likewise, there is no question that plaintiff seeks to assert in this case the exact claims that were previously raised and dismissed by the state courts pursuant to Tenn. R. Civ. P. 12.02(6). Finally, it is well settled that an order of dismissal granted pursuant to Tenn. R. Civ. P. 12.02(6) is a decision on the merits of the case. Dyer v. Intera Corp., 870 F.2d 1063, 1066 (6th Cir. 1989) ("Tennessee Rule of Civil Procedure 12.02(6) is based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. . . . In the federal courts, a dismissal pursuant to Rule 12(b)(6) is considered a decision on the merits with full res judicata effect.") (citations omitted). Accordingly, defendants are presumptively entitled to dismissal of this action on res judicata grounds.

A.

Plaintiff, however, seeks to avoid the application of res judicata on essentially three grounds. First, plaintiff argues, citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), that res judicata is inapplicable because its federal claims were not ripe until the state courts ruled on its claims. In Williamson County, the Supreme Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Federal] Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195. This rule rests; on the fact that the United States Constitution does not

prohibit takings per se, only takings without just compensation.[3]

Although plaintiff correctly states the principle of Williamson County, plaintiff improperly concludes that res judicata is inapplicable in such cases. On the contrary, as the Supreme Court has noted,

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in

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[3]In Bigelow v. Michigan Department of Natural Resources, 970 F.2d 154, 159-60 (6th Cir. 1992), the Sixth Circuit extended this ripeness doctrine to include procedural due process claims that arise from and are ancillary to the alleged taking. See Hoehne v. San Benito County, 870 F.2d 529, 532 (9th Cir. 1989) (stating that "the final decision requirement is applicable to substantive due process and equal protection claims brought to challenge the application of land use regulations, and is most likely applicable to related due process claims"); Harris v. Riverside County, 904 F.2d 497, 500 (9th Cir. 1990) (stating that "[p]rocedural due process claims arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case"). The court reasoned that "addressing the plaintiffs' procedural due process claim at this stage of the proceedings would allow future plaintiffs effectively to circumvent the ripeness requirement for takings claims simply by attaching a procedural due process claim to their complaint." Bigelow, 970 F.2d at 160.

> a state court proceeding in which he would rather not have engaged at all.

Allen v. McCurry, 449 U.S. 90, 104 (1980). Indeed, at least two Courts of Appeals have rejected plaintiff's exact argument and have found that the interaction between Williamson County and the Full Faith and Credit Act requires that a plaintiff landowner assert his federal claims in the state courts. For example, in Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989), the Third Circuit held: –

> Appellants have exhausted their state claims, which, under Williamson, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitle" them to no more.

Id. at 729; accord Palomar Mobile Home Park v. City of San Marcos, 989 F.2d 362, 364-65 (9th Cir. 1993) (citing Peduto).[4]

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[4]The Court does note, however, that the Ninth Circuit has partially retreated from its holding in Palomar. In Dodd v. Hood River County, 59 F. 3d 852 (9th Cir. 1995), the Ninth Circuit held: "We disagree ... with the suggestion that Williamson County is a thinly-veiled attempt by the [Supreme] Court to eliminate the federal forum for Fifth Amendment taking plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedures in the state." Id. at 861. The court,

This Court agrees with the reasoning of Peduto and Palomar and, therefore, finds plaintiff's argument unpersuasive.[5]

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however, did not overrule the res judicata principles set forth in Palomar. In particular, the Court notes that the Dodd court did not hold, as plaintiff suggests, that res judicata does not apply in cases where a plaintiff is required by Williamson County to litigate its claims in state court. Instead, it merely held that res judicata did not apply under the facts of that case, finding that the state and county had tacitly consented to the splitting of the claims and that the Oregon court had expressly reserved the federal constitutional issue for a later determination and, therefore, had not been fully adjudicated. Dodd, 59 F.3d at 862.

After review Dodd and the facts of this case, this Court finds that it is not confronted with the same factual circumstances. Specifically, there was no agreement between the parties that plaintiff could split its claims and there was no express reservation by the Tennessee courts of plaintiff's claims for a later determination. Instead, the Tennessee courts specifically addressed plaintiff's claims but found that they did not relate back under Tenn. R. Civ. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. Accordingly, the court dismissed those claims under Tenn. R. Civ. P. 12.02(6). In light of these differences, the Court finds that it need not address the issues raised in Dodd.

[5]In Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992), the Eleventh Circuit held that a plaintiff landowner can preserve his federal constitutional claims for federal court by making a reservation of rights in the state court proceeding. See Jennings v. Caddo Parish Sch. Bd., 531 F.2d

B.

Alternatively, plaintiff argues that res judicata is inapplicable because plaintiff did not have a full and fair opportunity to litigate its federal claims in state court. Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss at 7 (citing Kremer, 456 U.S. at 481). According to plaintiff, the state courts' refusal to hear its federal claims on the grounds that plaintiff was precluded from amending its pleadings under Tenn. R. Civ. P. 15.03 deprived it of a hearing on the merits of its federal claims and, therefore, violated due process. In making this argument, plaintiff relies, in part, on the Eleventh Circuit's opinion in Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991), overruled on other grounds by McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc). Plaintiff's reliance on Sewell, however, is misplaced. In Sewell, the plaintiff sought back pay and reinstatement when he filed a writ of mandamus in state court. In a subsequent federal action, the defendants argued that the matter was res judicata between the parties because the plaintiff had sought back pay and restitution in his mandamus action. The Eleventh Circuit, however, held that the plaintiff's federal claims were not barred by res judicata because the plaintiff had failed to receive a "legitimate opportunity to litigate

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1331, 1332 (5th Cir. 1976) (holding that a party can reserve her constitutional claims for subsequent litigation in federal court" by "making on the state record a reservation as to the disposition of the entire case by the state courts"). Because plaintiff made no such reservation of rights in this case, however, the Court expressly declines to decide whether such a reservation would be effective in similar cases.

his section 1983 claims in state court." Sewell, 946 F.2d at 762. Specifically, the court held that there is no res judicata effect when the state court completely ignores federal claims raised in state court. Id.

Unlike the state court in Sewell, however, the Tennessee courts did not completely ignore the federal claims raised by plaintiff. Instead, as noted above, the state courts considered plaintiff's proposed federal claims but dismissed them pursuant to Tenn. R. Civ. P. 12.02(6) on the grounds that they did not relate back under Tenn. R. Civ. P. 15.03 and were, therefore, barred by the applicable statutes of limitations. As further noted above, a dismissal pursuant to Tenn. R. Civ. P. 12.02(6) is a decision on the merits for res judicata purposes. Dyer, 870 F.2d at 1066. Thus, plaintiff's reliance on Sewell is misplaced.

In essence, the crux of plaintiff's argument is that it was denied due process because the decision of the Tennessee courts to dismiss its federal claims was erroneous. In reality, therefore, plaintiff seeks to have this Court review the validity of the state court's decision. The Court, however, declines this invitation on a number of grounds.

First, it is well settled that res judicata is based on the public policy favoring finality in litigation and does not depend on the validity of the underlying judgment. See Turnbow v. Pacific Mut. Life Ins. Co., 934 F.2d 1100, 4103 (9th Cir. 1991). Second, it is even more settled that the "federal district courts have no authority to review final judgments of a state court even when federal constitutional principles are involved." Palomar, 989

F.2d at 365 (citing District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484-85 (1983)). Thus, even assuming that plaintiff is correct and the state courts were bound to follow the federal relation back doctrine with respect to its federal claims and that the state courts applied it incorrectly, this Court may not review that decision. Instead, the proper federal forum, if any, for review of the state court's judgment is the United States Supreme Court. Id.

Furthermore, the Court notes that this is not a case where the state has employed a procedural rule to thwart federal rights in a systemic fashion. See McCurry, 449 U.S. at 100-101. Indeed, as plaintiff argues, the state courts were simply wrong in their holding that plaintiff could not amend its pleadings to assert its federal claims.[6] That the state courts were wrong, however,

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[6]Pursuant to Tenn. R. Civ. P. 15.03, only those claims that relate back to the original pleadings are saved from the effects of the applicable statute of limitations. Under Tennessee law, a claim relates back if it arises from the same conduct, transaction, or occurrence as set forth in the original pleadings. Karash v. Pigott:, 530 S.W.2d 775 (Tenn. 1975). In affirming the Circuit Court 's decision to dismiss, however, the Tennessee Court of Appeals held that "the Tennessee Supreme Court has determined that notice is the critical element involved in determining whether the amendments to pleadings relate back." Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment, 821 S. W. 2d 938, 942 (Tenn. Ct. App. 1991) (citing Floyd v. Rentrop, 675 8.W.2d 165, 168 (Tenn. 1984)). A review of Floyd, however, reveals that the plaintiff in that case sought to add a party to the action and not legal claims as here. In cases where

does empower this Court to review such a decision. To hold otherwise would require the federal district courts to review all state court decisions that dismissed any federal claims on a procedural ground. For obvious reasons, the Court declines plaintiff's invitation to transform the federal district courts into state appellate courts. Palomar, 989 F.2d at 366.

Finally, plaintiff seeks to challenge the state court proceedings on the grounds that even though "the state court found a constitutional violation, it erroneously and in violation of federal and state law refused to grant any monetary relief when it held that Rainey Bros.' damage claim was barred by the general immunity afforded to a municipality by [Tenn. Code Ann. § 29-20-205.]" Pl.'s Mem. at 10. Although the Court agrees with plaintiff that this decision was erroneous, see McKenna v. City of Memphis, 544 F. Supp. 415, 419 (W.D. Tenn. 1982) (holding that the Tennessee Governmental Tort Liability Act does not apply to inverse condemnation claims or due process claims arising under 42 U.S.C. § 1983), aff'd 785 F.2d 560 (6th Cir. 1986), that decision is not reviewable by this Court for the same reasons set forth above. Moreover, even if this Court could review this decision under certain circumstances,

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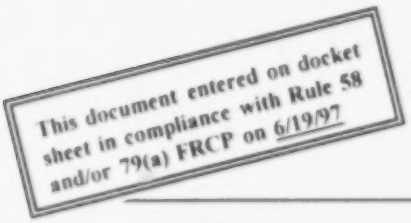
the plaintiff seeks to add a party, notice is indeed a critical element under Tennessee law. In cases where the plaintiff seeks to add legal claims, however, it is well settled that notice is not a required element. E.g., Karash, 530 S.W.2d 775; Branch v. Warren, 527 S.W.2d 89, 91 (Tenn. 1975); Walden v. Wylie, 645 S.W.2d 247 (Tenn. Ct. App. 1982).

the Court would decline to do so under the circumstances of this case. As noted above, plaintiff's state appeal from the Circuit Court's decision to dismiss its damage claim was dismissed on the grounds that plaintiff had failed to file the transcript with the court pursuant to Tenn. R. App. P. 24(a). In essence, therefore, plaintiff has procedurally defaulted whatever argument it may have had to assert a claim in this Court.[7]

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss is GRANTED, and this case is DISMISSED.
IT IS SO ORDERED this ___ day of June 1997.



\s\ Jon P. McCalla
JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

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[7]Defendants seek to extend this rationale to the entire case. As plaintiff correctly notes, however, the dismissal of its proposed federal claims was the subject of an interlocutory appeal. Accordingly, under Tennessee law, that issue became the law of the case once that interlocutory appeal process was exhausted, and plaintiff could not have reargued those issues in its subsequent appeal from the final dismissal. See Clements v. Pearson, 352 S.W.2d 236, 237 (Tenn. 1961) ("A ruling or decision once made in a particular case by an appellate court, while it may be overruled in other cases, is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review.").

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Rainey Brothers Construction Company, Inc. *Plaintiff-Appellant,*	)	Judgment In A Civil Case
v.	)	
	)	Case No. 96-3156
Memphis and Shelby County Board of Adjustment; and City of Memphis, Tennessee *Defendants-Appellees.*	)	M1-V

Filed
97 Jun 19

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Order granting Defendants' Motion to Dismiss or, in the Alternative, For Summary Judgment, entered June 18, 1997, this cause is hereby **DISMISSED WITH PREJUDICE.**

APPROVED:
/s/ Jon P. McCalla
JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE
JUNE 18, 1997

/s/ Robert R. Di Trolio
Clerk of Court

/s/ Wendy Warren
(By) Deputy Clerk

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 6/19/97.

Certified True Copy
Robert R. Di Trolio, Clerk; by: /s/ Vickie Mills

Certified True Copy
Robert R. DiTrolio,
Clerk By: V. Mills

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxes. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,15 and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United

States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, or support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§2101. Supreme Court time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgement or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action suit or proceeding, shall be taken within thirty days from the judgement, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time of for appeal or application for a writ of certiorari to review the judgement of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time toe enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted thereof, or fails to obtain an order plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constituion, laws, or treaties of the United States.

§1343. Civil rights and elective franchise

(a) The district courts shall be original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section --

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State. Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

§ 1983
Civil action for deprivation of rights

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of titles 13, 24 and 70 of the Revised Statutes of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in remedies and punish offenses against law, the common law, a modified and changed by the constitution and statues of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], Title VI of the Civil Rights Act of 1964 (42 U.S.C.

2000d et seq.] or section 13891 of this title,1 the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action of proceeding to enforce a provision of section 1982 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

29-16-123. Action initiated by owner. ---

(a) If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.

(b) Additionally, the court rendering a judgment for the plaintiff in a proceeding brought under subsection (a) of this section, arising out of a cause of action identical to a cause of action that can be brought against the United State under 28 U.S. C. § 1345(a)(2) or § 1491, or the attorney general or chief legal officer of a political subdivision of the state effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement such sum as will in the opinion of the court, or the attorney general or chief legal officer of a political subdivision of the state reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

§29-20-103

29-20-103. Application of chapter. —

(a) (1) Any governmental entity may exempt itself from the provisions of this chapter by action of its legislative body if such action is taken by January 1, 1975; provided, that §§ 7-31-103, 7-31-112, 7-51-202 (repealed) and 7-51-203, shall apply to any governmental entity exempting itself from the provisions of this chapter.

(2) Any governmental entity exempting itself from the provisions of this chapter may be resolution of its governing body elect at any time to come under the provisions of this chapter, provided that this chapter would only apply to claims or actions arising after the effective date of such resolution.

(b) After January 1, 1976, this chapter shall apply to all governmental entities as defined herein, provided that as to those governmental entities exempting themselves, as provided for in the preceding subsection, this chapter will only apply to claims or actions arising after January 1, 1976.

(c) Nothing in this chapter shall be deemed to deprive any person of any cause of action or damages to which they are otherwise entitled arising under the federal civil rights acts of 1871 and 1964 as amended.

§29-20-105

29-20-105. Inverse condemnation not affected. --- This chapter shall not apply to any action in eminent domain initiated by a landowner under §§ 29-16-123 and 29-16-124 nor be construed to impliedly repeal this statutes.

§29-20-205

29-20-205. Removal of immunity for injury caused by negligent act or omission of employees — Exceptions. — Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:

(1) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(2) Arises out of false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

(3) Arises out of the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;

(4) Arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;

(5) Arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probably cause;

(6) Arises out of misrepresentation by an employee whether or not such is negligent or intentional;

(7) Arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; or

(8) Arises out of or in connection with the assessment, levy or collection of taxes.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or part thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had to may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 15.03

15.03. Relation Back of Amendments. — Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back of the foregoing provision is satisfied and if, within the period provided by law for commencing an actin or within 120 days after commencement of the action, the party to be brought in by amendment(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(2)

Supreme Court, U.S.
FILED
AUG 3 1999
OFFICE OF THE CLERK

No. 99-60

IN THE

Supreme Court of the United States

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT and CITY OF MEMPHIS, TENNESSEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a plaintiff-landowner, through its own procedural errors, fails to prosecute its case properly in state courts, should the courts of the federal system be required to assume appellate jurisdiction of state court rulings in order to grant such plaintiff-landowners an additional forum in which to litigate their claims?

2. Was the application of Tennessee law to the Petitioner's federal and state claims either: (i) facially unconstitutional; (ii) inadequate for full litigation of a constitutional claim; or (iii) practically inadequate though theoretically adequate, as required to obtain federal review of substantive state court rulings under this Court's holding in *Allen v. McCurry*, 449 U.S. 90 (1980).

3. Because the petitioner's procedural errors and omissions in state court were the cause of its inability to make a full progression through the Tennessee state court mechanisms for obtaining just compensation, does the plain language of this Court's holding in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) preclude the petitioner from seeking federal relief under 42 U.S.C. § 1983?

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OPINIONS BELOW

On April 5, 1999, the Court of Appeals for the Sixth Circuit filed a decision affirming the granting of the Defendant's motion to dismiss by the United States District Court for the Western District of Tennessee. (Petitioner's App. A.) On June 18, 1997, the decision of the district court granting the motion to dismiss was filed and reported as *Rainey Brothers Construction Company, Incorporated v. Memphis and Shelby County Board of Adjustment*, 967 F. Supp. 998 (W.D. Tenn. 1997).

STATEMENT OF THE CASE

The Petitioner is the owner of a fourteen-acre tract of land in the eastern area of Memphis, Tennessee. On February 3, 1964, the Petitioner presented to the Memphis City Planning Commission a preliminary plan to develop single-family housing on his land, but was told that the minimum building elevation had been increased. In the Petitioner's opinion, this increase made construction of single family homes economically impossible and it amended the planned construction to involve multi-family homes. After its application for a permit to build 432 apartment units was rejected, the Petitioner eventually obtained permits necessary to undertake construction of 165 apartments at an elevation of 274.9 mean sea level. (Petitioner's App. B, pp. 2-3.)

The Petitioner requested and was granted a hardship variance to allow it to construct the contemplated apartments at an elevation of 270 mean sea level. The Board, however, did so in executive session with no required notice or hearing provided to the neighbors or other interested parties who had the legal right to object to the change in elevation. The

Petitioner began work on the apartment units, including the initial process of framing. (Petitioner's App. B, pp. 3-4.)

On April 28, 1976, an attorney representing objectors to the apartment construction, apparently having found out about the new construction, persuaded the Board of Adjustment to rescind the August, 1975 variance and reinstate the higher elevation requirement. Again the Board acted without notice or hearing. The City forwarded a "Notice of Disposition" advising of the Board's action and indicating that the building elevation had been returned to its original level, 274.9 mean sea level. The Petitioner asked the Board for a rehearing, but was denied. Eventually, the Board and City revoked the Petitioner's permits for construction of the apartments. (Petitioner's App. B, pp. 5-6.)

On May 26, 1976, the Petitioner filed two (2) actions in Tennessee State Courts against the Memphis and Shelby County Board of Adjustment and the City of Memphis, Tennessee. One of the suits sought a writ of certiorari and the second sought money damages under Tennessee law for rescission of the building permits granted to the Petitioner. After these two claims were filed, no further action was taken by the Petitioner until November 14, 1988, *twelve years later*, when it sought and was granted leave to file an amended complaint in each action. The amended complaints significantly increased the damages sought and included specific additional claims for inverse condemnation under Tenn. Code. Ann. § 29-16-123, a takings claim under the federal constitution, and substantive and procedural due process claims under the state and federal constitutions. (Petitioner's App. B, pp. 5-7.)

On August 2, 1989, the Petitioners' additional claims were dismissed by the trial court because, in the court's opinion, they did not "relate back" to the original claims as required by Tenn. R. Civ. P. 15.03. The trial court then granted the Plaintiff's motion for leave to file an interlocutory appeal with the Tennessee Court of Appeals, which affirmed the circuit court's dismissals. Application was made and denied for a writ of certiorari to both the Tennessee Supreme Court and the United States Supreme Court. (Petitioner's App. B, pp. 7-8.)

On April 25, 1994, after the Petitioner's attempt to have its additional claims heard had been rejected by the circuit court, the Tennessee Court of Appeals, the Supreme Court of Tennessee, and the United States Supreme Court, a non-jury trial was begun on the merits of the original state law claims in the circuit court of Shelby County, Tennessee. The circuit court ruled in favor of the Petitioner on May 17, 1994 on the writ of certiorari based on a stipulation by the Board and City that the April 1976 rescission of the variance, like the August 1976 granting of the variance, was granted by the Board without sufficient procedural due process, and therefore, like its August 1975 predecessor, was void or voidable. The trial court then refused to grant monetary relief. (Petitioner's App. B, pp. 8-9.)

On May 27, 1994, the Petitioner filed a notice of appeal with the Tennessee Court of Appeals. Because as of April 18, 1995, Petitioner had failed to file a transcript with the court, the Petitioner's appeal was dismissed with prejudice pursuant to Tenn. R. App. P. 24(b). The Petitioner's application for permission to appeal to the Tennessee Supreme Court was denied. (Petitioner's App. B, p. 9.)

On November 5, 1996, the Petitioner filed an action in the United States District Court for the Western District of Tennessee under 42 U.S.C. § 1983 which asserted a substantive due process claim, a procedural due process claim, and an inverse condemnation claim. (Petitioner's App. B, p. 10.) On June 18, 1997, the district court granted the Board and City's Motion to Dismiss.

The Sixth Circuit Court of Appeals affirmed the decision of the district court in an opinion filed on April 5, 1999.

SUMMARY OF ARGUMENT

A review of the decisions of the various circuits does not demonstrate the confusion and conflict that the Petitioner alleges. The circuits have uniformly held that developers and other takings claimants are subject to the "full faith and credit" statute, 28 U.S.C. § 1738, where the facts of the case are appropriate. Therefore, there is no urgent need for the guidance of this Court regarding the way in which the circuits are to apply the rule of *Williamson County*.

The procedural history of this case in Tennessee courts also makes it a particularly inappropriate candidate for review by this Court. After the Petitioner received adverse judgments in state court, the proper next step in ripening its claims for federal review was to perfect an appeal to the Tennessee Court of Appeals. The Plaintiff failed to perfect such appeal and failed to show good cause why appeal should be allowed despite its procedural error. In this light, the Petitioner's argument that the state of Tennessee somehow created a "procedural morass" which smothered its claims is unavailing. A requirement that a transcript be filed within ninety days of the filing of the notice of appeal is not

unreasonable, and compliance with reasonable procedural guidelines is a prerequisite for a full hearing in any judicial forum. The Petitioner's case has never been ripe for federal hearing because, through its own errors and despite adequate Tennessee judicial provisions, the Petitioner neglected to ripen it.

This Court has held that federal district courts cannot assume appellate jurisdiction over state court judgments. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). To hold otherwise would subject the federal district courts to a flood of litigation involving state court cases which dismissed federal claims for any procedural reason.

As the district court below pointed out, even if the state courts committed an error in applying Tennessee law concerning when a claim properly "relates back" to an earlier complaint, there is no evidence here that the state has unconstitutionally employed a procedural rule to thwart federal rights in a systematic fashion. (Petitioner's App. B, p. 18; citing *Allen v. McCurry*, 449 U.S. 90, 100-101 (1980)). The Petitioner forcefully states that the state of Tennessee subverted its due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, but it has made no persuasive demonstration (merely forceful statements) that the state court mistakes amounted to an unconstitutional denial of a full and fair hearing. At every stage of this case, the Petitioner has had the *opportunity* to ripen its claim as *Williamson County* requires. If the Petitioner has been "trapped," the trap was crafted not by the unconstitutionality of Tennessee state court actions, but by the Petitioner's errors and omissions.

REASONS FOR DENYING THE WRIT

I.

FEDERAL CIRCUIT COURTS HAVE CONSISTENTLY APPLIED THE FULL FAITH AND CREDIT STATUTE TO FEDERAL COURT TAKINGS CLAIMS TO HOLD THAT PLAINTIFFS DO NOT HAVE AN UNFETTERED OPPORTUNITY TO RELITIGATE PREVIOUSLY DECIDED CLAIMS IN FEDERAL COURT.

The Petitioner alleges that certiorari needs to be granted to address a circuit conflict regarding a developer's ability to relitigate issues in federal court after seeking compensation in state court. The circuit conflict posited by the Petitioner simply does not exist. Indeed, the many circuits to address the issue have uniformly ruled that developers and other takings claimants are subject to the federal "full faith and credit" statute (28 U.S.C. § 1738) where appropriate. Not a single case cited by the Petitioner is to the contrary, and no court would have the discretion to ignore 28 U.S.C. § 1738, which is one of the oldest provisions in the United States Code.

The cases cited by the Petitioner establish three entirely consistent rules regarding application of claim and issue preclusion to federal court takings claims. The first rule — and the only rule necessary to support the decision here — is that, absent a reservation of a federal claim by a takings plaintiff, state rules of claim and issue preclusion (or *res judicata* and collateral estoppel, using Petitioner's terms) apply with full force. *See Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.3d 362,

364-365 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3rd Cir. 1989). Even the cases relied upon by the Petitioner support this rule. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1309 (11th Cir. 1992) ("state law res judicata principles will bar any federal law claims that were neither raised nor reserved . . . in state court").

Petitioner made no effort to reserve its federal claims while litigating in state court. Thus, the Sixth Circuit's decision to apply Tennessee rules of claim and issue preclusion was consistent with the holding of every other circuit that has considered the issue. Like most states, Tennessee claim preclusion law bars relitigation where the claimant had a "full and fair opportunity" to present the claim in another forum. After ruling that the state court had indeed afforded Petitioner "a full and fair opportunity to litigate its claims," (Petitioner's App. A, p. 6), the Sixth Circuit was required to dismiss the Petitioner's federal court claim.

Fields and the other cases relied upon by the Petitioner to establish its alleged circuit split address the separate question of the application of state claim preclusion rules in cases where a plaintiff "reserves" a federal takings claim while litigating in state court. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998). *Fields*, *Front Royal* and the Ninth Circuit's ruling in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir 1995) ("*Dodd I*") stand for the proposition that a plaintiff can reserve a takings claim in state court to preserve access to a federal forum. *See Dodd I*, 59 F.3d at 862; *Fields*, 953 F.2d at 1306; *Front Royal*, 135 F.3d at 283 (quoting *Fields*). *Dodd I* and *Fields* go one step further and

hold that where a takings plaintiff successfully reserves a federal claim in state court, the federal court is not obliged to apply claim preclusion to "extinguish the entire [federal] claim." *Dodd I*, 59 F.3d at 861-62; *Fields*, 953 F.2d 1299.

Dodd I and *Dodd v. Hood River County*, 136 F.3d 1219, 1227 (9th Cir.), *cert. denied*, 119 S. Ct. 298 (1998) (*Dodd II*) address a third issue: whether a takings plaintiff, in federal court after successfully reserving a federal claim in state court, can relitigate the precise issues decided by the state court. The Ninth Circuit ruled that where plaintiffs "fully litigated a necessary issue in the course of the state proceedings" issue preclusion applies to prevent "a second bite at the same apple." *Dodd II*, 136 F.3d at 1227; *see also Dodd I*, 59 F.3d at 863; *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1073-74 (3d Cir. 1990); Restatement (Second) of Judgments § 86, comment f, illustration 7 (1982).

Applying issue preclusion, *Dodd II* held that Oregon and federal law were identical in determining whether a per se taking occurred under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Thus, the court gave full faith and credit to the state court's determination on this issue. 136 F.3d at 1229-30. Finding that Oregon law differed from federal law on whether a taking occurred under the multi-factored inquiry of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the court addressed the merits of that claim, rejecting it because the environmental protections at issue were reasonable and the owners lacked investment-backed expectations to use their property in a manner that contravened pre-existing rules.[1]

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1. Petitioner's discussion of *Dodd I* and *Dodd II* is remarkably disingenuous. Contrary to petitioner's contention, there was neither (Cont'd)

In short, the lower courts have effectively and consistently applied the "full faith and credit" statute to takings claims in federal court after adjudication under state procedures. The circuits have carefully preserved a federal forum for property owners by allowing a reservation of a federal claim and, where a reservation is made, relaxing the rule of claim preclusion. At the same time, circuits have refused to permit wasteful federal court relitigation of issues fully and fairly resolved in a state forum. The circuits have struck "a delicate balance between the interests of the defendant and of the courts in bringing litigation to a close and the interests of the plaintiff in the vindication of a just claim." *Dodd I*, 59 F.3d at 862. There is no reason for this Court to upset this delicate balance.[2]

(Cont'd)

a "bait" in *Dodd I* nor a "switch" in *Dodd II*. *See* Petition at 9 n.5 & 15. Both cases, written by the same judge, hold the same thing: a "reservation" of a federal takings claim prevents application of claim preclusion but does not prevent preclusion of issues actually litigated in the state forum. Compare *Dodd I*, 59 F.3d at 863 with *Dodd II*, 136 F.3d at 1227. Moreover, contrary to Petitioner's assertion (Petition at 15), the Ninth Circuit did not simply affirm the district court's dismissal of Dodd's claim based on issue preclusion. *Dodd II*, 136 F.3d. at 1228. The Ninth Circuit limited the district court's preclusion ruling and addressed and rejected the crux of Dodd's claim on the merits. Finally, Petitioners fail to point out that this Court was offered and declined an opportunity to review *Dodd II*. *See* 119 S. Ct. 298 (1998).

2. Nor is there any reason to "reconsider" *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) (Petition at 22), which this Court emphatically reaffirmed just months ago. *City of Monterey v. Del Monte Dunes*, 119 S. Ct. 1624 (1999).

Petitioner's claim reduces to the mistaken proposition that it should have an unfettered right to litigate its takings claim in federal court. This Court in *Allen v. McCurry*, 449 U.S. 90 (1980) expressly rejected this contention. *Allen* upheld a federal court's application of issue preclusion to bar a criminal defendant from relitigating, through a 42 U.S.C. § 1983 claim, a Fourth Amendment search and seizure claim that was rejected by the state court in the course of the state criminal proceedings. The Court specifically rejected the "generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 100. The Court reasoned:

> [t]he authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself. For reasons already discussed at length, nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights.

Allen, 449 U.S. at 103-04 (footnotes and citations omitted).

This Court also ruled in *Allen* that it made no difference that the plaintiff's forum for the initial litigation of the claim was imposed upon him, commenting:

> [t]here is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104 (footnotes omitted).

Finally, the *Allen* court emphatically rejected the notion, advanced by Petitioner here, that state courts are incapable of enforcing federal constitutional rights. *See Allen*, 449 U.S. at 105; *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (citation omitted) ("a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights . . .")

This Court has repeatedly held that application of the doctrines of claim and issue preclusion in actions under § 1983 reduces wasteful relitigation and "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96. By suggesting that these doctrines should be eliminated in takings cases, Petitioner is seeking preferential treatment — a chance to get two bites at the apple — that has been denied to criminal defendants and other constitutional claimants.[3]

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3. The *Allen* court also expressly rejected the Petitioner's argument that takings claimants should be given the same right to relitigate claims as that afforded to habeas petitioners. *See* Petition at 27-28. As *Allen* states, the traditional exception to res judicata

(Cont'd)

II.

THE PETITIONER'S PROCEDURAL LAPSES IN TENNESSEE STATE COURT MAKE THIS A PARTICULARLY INAPPROPRIATE CASE FOR THIS COURT TO REVIEW.

As documented above, there simply is no confusion or conflict among the circuits regarding the application of the Full Faith and Credit statute to the rule set forth by the Court in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985). Even if the Court were inclined to give guidance on this subject matter, however, the Petitioner's own procedural mistakes in the Tennessee state court case make this action a wholly ineffective candidate for this Court's review. In its strident outline of the "procedural morass" wrought by Tennessee state courts, the Petitioner has conveniently glossed over its own fundamental missteps.

The Petitioner's self-induced procedural misadventure began after it filed two actions (one which sought money damages and another which sought a writ of certiorari) in 1976 and then waited *twelve years* to pursue these actions at all. Until November 14, 1988, the Petitioner took no steps to advance its cause of action. While the Petitioner has correctly pointed out that "regulatory taking cases can be time consuming" (Pet., p. 1), an absolute standstill spanning twelve years is difficult for any court to fathom. Despite the

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(Cont'd)
for habeas corpus review, *see Preiser v. Rodrigues*, 411 U.S. 475, 497 (1973), provides no analogy to § 1983 cases, since that exception finds its source in the unique purpose of habeas corpus — to release the applicant for the writ from unlawful confinement." *Allen*, 449 U.S. at 98, n.12 (citation omitted).

unexplained delay, the Petitioner was granted leave by the trial court to add several state and federal claims. (Petitioner's App. B, p. 6.) On motion of the Board of Adjustment and City of Memphis, the amendments to Petitioner's original complaints were dismissed. After appeal of the dismissal of the amendments, the claims of the Petitioner as set forth in 1976 were eventually considered on the merits by the circuit court of Shelby County, Tennessee. After that hearing, a decision was rendered in favor of the Petitioner, but no compensation was awarded. (Petitioner's App. B, p. 8-9.)

Feeling aggrieved, the Petitioner filed a notice of appeal in the Tennessee Court of Appeals on May 27, 1994. However, despite the requirement found in Tenn. R. App. P. 24(b) that an appellant file a transcript with the court within ninety days, no transcript had been filed by April 7, 1995, some ten months after the notice of appeal was filed. For that reason, the appeal was dismissed with prejudice on April 18, 1995, and the Petitioner began its quest for a federal forum. (Petitioner's App. B, p. 9.)

In light of this procedural background, the Petitioner's obstinate desire to be heard in a federal forum closely resembles a desire to obtain a bite at a fresh apple after having negligently lost the one it was first given. In *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), this Court defined the "full and fair opportunity" requirement by stating that the "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. The state courts of Tennessee meet and exceed this definition as a capable forum of providing relief to the Petitioner. Because of procedural errors, the Petitioner

failed to avail itself of the full and fair opportunity presented to ripen its case for federal hearing pursuant to the rule of *Williamson County*. Therefore, the Petitioner's claims do not merit a reconsideration of the mechanics of the *Williamson* rule.

In Section I(A) of its brief, the Petitioner emphasizes the fact that the rule of *Williamson County* contains a clear temporal element:

> The *Williamson County* opinion then goes on the say that because of the lack of both a final administrative decision and the absence of an attempt to seek compensation in state court, ". . . respondent's claim is not ripe." (473 U.S. at 186) Please note again that the phrase chosen was "not ripe" rather than "dead." Absence of ripeness necessarily means that things need to — and can — be done to make the matter ripe.

(Pet., p. 11.)

Indeed, there are things that "need to — and can — be done" to ripen a claim. The Petitioner's primary difficulty is that it needed to do these things, could have done them, but did not. Throughout the Tennessee state court proceedings, a full and fair opportunity was present to ripen federal claims by proper progression through the state system. The Petitioner's claim was not dead until allowed to die on the vine through Petitioner's own procedural neglect.

Thus, the decisions of the two federal tribunals which have ruled on this case have not discounted the mandate of "not yet" and "not until" emphasized in the Petitioner's brief.

These courts have simply recognized that the Petitioner's actions played an important role in creating its current difficulty.

The Petitioner also urges, in Section I(B) of its brief, that the district court undertook a "mechanical application of preclusion rules" which was subsequently affirmed by the Sixth Circuit. (Pet., p. 14.) However, it is clear from the district court's order that it undertook a considered analysis of the relevant case law regarding *res judicata* principles and did not blindly grant preclusive effect to the rulings of the Tennessee state courts. The court stated that:

> Under Tennessee law, a previous action is given preclusive *res judicata* effect if: (1) the underlying judgment was rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; (4) the underlying judgment was on the merits. (Citations omitted.)

Rainey Bros. v. Memphis and Shelby Cty Bd. of Adjust., 967 F. Supp. 998, 1003 (1997).

In analyzing the Tennessee *res judicata* principles and concluding that these principles should apply to enact a final enforcement of the state court judgments against the Plaintiff, the district court wrote as follows:

> [I]t is beyond dispute that the Tennessee state courts have jurisdiction to hear federal statutory and constitutional claims. Nor is there any dispute that the same parties involved in this case were also parties to the state court action. Likewise,

> there is no question that Plaintiff seeks to assert in this case the exact claims that were previously raised and dismissed by the state courts pursuant to Tenn R. Civ. Pro. 12.02(6). Finally, it is well settled that an order of dismissal granted pursuant to Tenn. R. Civ. Pro. 12.02(6) is a decision on the merits of the case.

Id.

From the foregoing, it is clear that the District Court did not, as the Petitioner asserts, blindly grant preclusive effect to the Tennessee judgment because of a mistaken interpretation of *Williamson County*. The district court interpreted and applied the relevant Tennessee precedent regarding *res judicata* preclusion and utilized that reasoning to grant full faith and credit to the ruling of the Tennessee circuit court.

In fact, it is evident from the district court's opinion that the Petitioner's missed appeal deadline was a major factor in the decision to grant the motion to dismiss of the Board of Adjustment and City of Memphis. The court stated that:

> [E]ven if this Court could review this decision under certain circumstances, the Court would decline to do so under the circumstances of this case. As noted above, plaintiff's state appeal from the Circuit Court's decision to dismiss its damage claim was dismissed on the grounds that plaintiff had failed to file the transcript pursuant to Tenn. R. App. P. 24(a). In essence, therefore, plaintiff

> has procedurally defaulted whatever argument it may have had to assert a claim in this Court.

Rainey Bros., 967 F. Supp. 998, 1006 (6th Cir. 1997).

To grant the Petitioner's application for certiorari in this case, this Court would be forced to overstep not only its own mandate in *Williamson County*, but also the fact that the Petitioner procedurally defaulted its ability to progress fully through the state courts of Tennessee by overlooking or ignoring the reasonable requirement that a transcript be filed on appeal.

Therefore, this Court should decline the Petitioner's application for review in this case.

III.

BECAUSE, THROUGH DILATORY PRACTICES AND PROCEDURAL ERRORS, THE PETITIONER FAILED TO AVAIL ITSELF OF THE OPPORTUNITIES TO LITIGATE ITS CLAIMS IN TENNESSEE STATE COURTS, THE PLAIN LANGUAGE OF THIS COURT'S HOLDING IN *WILLIAMSON COUNTY* PRECLUDES THE PETITIONER FROM SEEKING FEDERAL RELIEF UNDER 42 U.S.C. § 1983.

In *Williamson County*, this Court stated that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 196 (1985). The Court set forth two discrete requirements for asserting a federal claim that

government regulation has effected a taking for which the Fifth Amendment requires compensation. A claimant must: (a) properly utilize a state's procedure for providing just compensation; and (b) suffer a denial of compensation. The Petitioner fails the first prong of this test. It did not properly utilize Tennessee procedure for compensation. Rather, through its procedural nonchalance, it forfeited the opportunity to ripen its claim for federal hearing.

Accordingly, the Petitioner cannot argue with any authority that the subsequent actions of the state courts of Tennessee were unconstitutional. Even though these courts did not grant monetary compensation to the Petitioner, they provided a full opportunity for the Petitioner to ripen its claims for future federal hearing. To ripen a claim under the rule of *Williamson County*, the important factors are: (a) fully utilizing state procedures which are adequate for compensation; and (b) being finally denied compensation after full use of state procedures.

A fortiori, because the Petitioner defaulted its ability to test the adequacy of Tennessee's procedure for compensation, it cannot assert a federal claim for violation of the Just Compensation Clause under the rule of *Williamson County*. The Petitioner simply cannot make a powerful claim that it was subjected to a gross denial of a fair hearing when its own appeal failed because it disregarded the Tennessee Rules of Appellate Procedure.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States District Court for the Western District of Tennessee, as well as the judgment of the United States Court of Appeals for the Sixth Circuit dismissing the Petitioner's claims, should be affirmed and this appeal dismissed. The petition for a writ of certiorari fails to state a special, important reason for review, pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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(3)

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In The
SUPREME COURT OF THE UNITED STATES

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD
OF ADJUSTMENT; AND
CITY OF MEMPHIS, TENNESSEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The *amicus* has received the parties' written consent to submit this brief.[1] Letters of consent have been filed with the Clerk of this Court.

The National Association of Home Builders ("NAHB") represents over 195,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);[2] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[3] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Council*,

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and *amicus* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.

[3] The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Monterey*, 119 S. Ct. 1624 (1999).

The decision of the Circuit Court below, although extreme in its outcome (the city concedes it violated the property owner's constitutional rights but no remedy is available in either state or federal court), is not atypical in the singular world of constitutional land use law. Since this Court decided *Williamson County*, lower circuit courts facing regulatory taking actions have twisted *Williamson County's* ripeness requirement into a *res judicata* barrier, preventing property owning citizens any chance of seeking just compensation under 42 U.S.C. § 1983 for violations of their Fifth and Fourteenth Amendments rights. The *amicus*, on behalf of many of those property owning citizens, explicates for this Court the conflicts and confusion of the lower federal courts in this arena of the Bill of Rights.

SUMMARY OF ARGUMENT

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a takings claim only becomes ripe for adjudication in federal court if a landowner first seeks and has been denied just compensation in state court. This Court, however, did not discuss the interaction between this ripeness requirement and the Full Faith and Credit Act ("FFCA" or "Act"), 28 U.S.C. § 1738. That Act generally requires federal courts to apply to a prior state court judgment the *res judicata* and collateral estoppel rules of the state issuing the judgment.

Despite this silence, this Court could not have intended *Williamson County* to push injured landowners into a pointless

judicial maze, which is what the lower court has done. The growing conflict and confusion among the federal circuits on the issue of ripeness and the Takings Clause has led to the Sixth Circuit ruling that, even where a city concedes it violated a citizen's constitutional rights, no meaningful forum is available to a property owner to remedy that violation.

The Sixth Circuit also misapplied *Williamson County*, this Court's FFCA jurisprudence, and Tennessee's *res judicata* principles. Under Tennessee law, a judgment cannot bar a claim that has yet to accrue. *Williamson County* made clear that a federal takings claim does not ripen or accrue until the landowner concludes state court litigation seeking just compensation. By holding to the contrary, the Sixth Circuit violated the FFCA, which prohibits a federal court from giving more preclusive effect to a state court judgment than the courts of the state rendering the judgment.

REASONS FOR GRANTING THE WRIT

I. THE INTERSECTION OF *WILLIAMSON COUNTY'S* RIPENESS REQUIREMENT WITH THE FULL FAITH AND CREDIT ACT HAS CREATED CONFLICT AND UNCERTAINTY AMONG THE LOWER COURTS

A. *Williamson County* Held that a Federal Takings Claim Accrues Only Upon the Claimant Exhausting State Judicial Proceedings for Compensation Without Discussing the Effect of the Full Faith and Credit Act

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court announced

a two part test that landowners must satisfy before their takings claims are "ripe" for adjudication in federal court.

Ripeness first requires that "the government entity charged with implementing the regulations [must] ha[ve] reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. This prong of *Williamson County* is not at issue here. *See generally Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (discussing this prong of the *Williamson County* ripeness test).

Instead, the Petition for Writ of Certiorari centers on the confusing and conflicting interpretations of the second prong of the *Williamson County* ripeness test: the landowner must "seek compensation through the procedures the State has provided for doing so" before bringing a takings claim in federal court pursuant to 42 U.S.C. § 1983. *Williamson County*, 473 U.S. at 194. Although all other constitutional violations do not have to be first litigated in state court before seeking a federal forum,[4] this Court reasoned that the "nature" of the Takings Clause required otherwise; the Fifth Amendment does not prohibit takings, but rather "takings *without just compensation* . . . ." *Id.* at 194 & n.13. Accordingly, this Court held that "*no constitutional violation occurs until* just compensation has been denied" in state court because "the State's action . . . is not complete until the State fails to provide adequate compensation for the taking." *Id.* at 194 n.13, 195 (emphasis added) (internal quotation marks and citation omitted).

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[4] *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496, 504 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled in part on other grounds, Monell v. Department of Social Servs.*, 436 U.S. 658, 695-701 (1978).

This Court did not explain how to reconcile this ripeness requirement with the Full Faith and Credit Act ("FFCA" or "Act"), 28 U.S.C. § 1738.[5] Under the FFCA, "a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). Thus, a federal court applies the *res judicata* and collateral estoppel rules "chosen by the State from which the judgment is taken." *Marresse v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).[6]

Compounding the silence on the FFCA issue, this Court had previously held in two distinguishable cases that the Act required the application of state preclusion rules to Section 1983 claims brought for certain constitutional violations. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980). As explained below in Part II, *McCurry* and *Migra* only heightened

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[5] The Act provides:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

[6] However, a federal court must not apply the FFCA when (1) the party against whom judgment was entered lacked a "full and fair opportunity" to litigate the claim or issue, *see, e.g., Kremer v. Chemical Const. Corp.*, 456 U.S. 460, 480 (1982) (citation omitted); or (2) another federal statute creates an "implied partial repeal" of the FFCA, *see, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380 (1996) (citation omitted).

the *Williamson County* confusion because neither involved a constitutional violation such as a takings claim that requires, as an element of recovery, prior litigation in state court. *Migra*, moreover, clarified that the FFCA applies to a Section 1983 claim only when a litigant first seeks to voluntarily litigate in state court, whereas *Williamson County* forces landowners to first litigate in state court before seeking redress in a federal court.

Thus, for the last fourteen years, lower courts have differed over how to apply *Williamson County's* ripeness requirement in light of the FFCA, *McCurry*, and *Migra*. These jurisprudential differences have become a thicket of conflicting holdings, principles, and exceptions, leaving landowners without any clear guidance regarding the proper forum and procedure for challenging unconstitutional confiscations of their property.

B. Lower Courts Conflict in Resolving the Intersection of *Williamson County's* Ripeness Requirement with the Full Faith and Credit Act

In this case, the Sixth Circuit held that once a landowner has "ripened" its takings claim under *Williamson County* by first bringing state court litigation, the landowner's claim immediately becomes "rotten" because of the FFCA's imposition of state *res judicata* rules, even when, as here, the defending locality stipulated that it violated the landowner's constitutional rights. *See* Petitioner's Brief, App. A, at 4-7. Furthermore, the Sixth Circuit's opinion suggested that the lower federal courts should only review "ripened" takings claims to determine whether the ripening process in state court complied with "the minimum procedural requirements" of due process. *Id.* at 6 (internal quotation marks and citation omitted).

In so holding, the Sixth Circuit reflects a misunderstanding of *Williamson County* and the FFCA seemingly shared by the Third Circuit. In *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989), the landowners ripened their takings claim by seeking just compensation in New Jersey state court before filing suit in federal court. *See id.* at 726-27. But the district court and Third Circuit dismissed this ripened claim as barred by *res judicata*. *See id.* at 727-29. According to the Third Circuit, the very act of ripening the takings claim - the "hear[ing]" and "reject[ion]" of the takings claim "on the merits" in state court - also barred that claim. *See id.* at 728. When the landowners pointed out that the court's misreading of *Williamson County* and the FFCA would "deny [landowners] a federal forum," the Third Circuit candidly rejoined that "[d]enial of a federal forum, however, does not amount to denial of due process." *Id.* at 728-29.

Apparently, however, the same federal court is more open to some than to others. In *Midnight Sessions, LTD. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), the court reviewed the merits of a claim that a city's denial of a business license for a dance hall constituted a taking, even though the plaintiffs had not brought their takings claim in state court first. *See id.* at 675-79. This inconsistency simply reflects the "lower courts' condescension against constitutional land use matters,"[7] so much so that dance hall operators receive a takings adjudication on the merits in the Third Circuit, while landowners denied the ability to use their real property must shuffle back and forth between federal and state courts.

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[7] Testimony of Professor Daniel R. Mandelker on H.R. 1534 Before the House Judiciary Committee (Sept. 23, 1997), *reprinted in* John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the 'Ripeness Mess?' A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urban Lawyer 195, 237 (1999).

Similarly, the Ninth Circuit has been inconsistent in resolving the tension between the FFCA and *Williamson County*. In fact, the Ninth Circuit, has both followed and rejected the Third Circuit's opinion in *Peduto*. In *Palomar Mobilehome Park Association v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993), the Ninth Circuit relied heavily on *Peduto* in holding that the FFCA required it to apply *res judicata* to a landowner's takings claim that had first been ripened in state court. Yet in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*"Dodd I"*), *cert. denied*, 119 S. Ct. 278 (1998), the same court rejected the "suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment takings plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedures in the state." *Id.* at 861. This flatly contradicts the Third Circuit's interpretation of *Williamson County* in *Peduto*: "Appellants have exhausted their state claims, which, under *Williamson*, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims . . . . Due process . . . entitles them to no more." 878 F.2d at 729.

The Ninth Circuit has further disagreed with itself regarding whether a landowner may "reserve" a federal takings claim for federal court adjudication while pursuing the state court proceedings mandated by *Williamson County*. In *Dodd I*, the Ninth Circuit held that state *res judicata* principles did not bar the Dodds' federal takings claim because the Dodds filed a written "reservation" informing the court that they intended to litigate their federal takings claim in federal court. Subsequently, a different panel of the Ninth Circuit in *Macri v. King County*, 126 F.3d 1125, 1130 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1178 (1998), noted that *Dodd I* "clearly holds that a court can reserve a federal issue so that the issue will not be precluded from further litigation despite [an] assertion that [a]

federal claim will necessarily be precluded by res judicata." *Id.* at 1130 n.7. But then in a subsequent opinion, the original panel in *Dodd I* held that state principles of collateral estoppel barred the Dodds' takings claim, despite the reservation, without even mentioning *Macri*. *See Dodd v. Hood River County*, 136 F.3d 1219, 1224-28 (9th Cir. 1998) ("*Dodd II*"), *cert. denied*, 119 S. Ct. 278 (1998).

Relying on the Ninth Circuit's decision in *Palomar* and the Third Circuit's decision in *Peduto*, the Tenth Circuit barred landowners' ripened takings claims in *Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319 (10th Cir. 1998). Unlike the Third Circuit, however, which seems comfortable foreclosing federal court review of *landowners'* takings claims, the Tenth Circuit "note[d]" its "concern that *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims . . . ." *Id* at 1325 n.4. And the Tenth Circuit noted the "difficult[y] [of] reconcil[ing] the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel." *Id.*

In contrast to the Third, Sixth, Ninth, and Tenth Circuits' wooden application of the FFCA to ripened takings claims, the Eleventh, Fifth, and Fourth Circuits have attempted to reconcile the requirements of the Act with *Williamson County*. In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), the Eleventh Circuit held that the FFCA would not bar a takings claim that had been ripened by prior state court litigation, so long as the landowner filed a "reservation" stating its intent to litigate their federal claims in federal court. The Eleventh Circuit relied on *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976), where the Fifth Circuit held that such reservations could be used generally to prevent preclusion where a plaintiff has federal claims, but has been "forced to bring . . . constitutional

claims in state court rather than proceed directly to federal court . . . ." *Id.* at 1332. Finally, in *Front Royal & Warren County Industry Park Corporation v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998), the Fourth Circuit agreed with the Eleventh Circuit in *Fields* that a reservation could preserve a federal takings claim when a landowner must first pursue state judicial relief pursuant to *Williamson County*. *Id.* at 283.[8]

The Fourth, Fifth, and Eleventh Circuits derived this "reservation" exception from this Court's opinion in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). There, this Court held that a federal court litigant pushed into state court because of *Pullman* abstention[9] may preserve a federal forum for adjudication of his federal claims by making an on the record "reservation" in state court, which informs the state court that the litigant intends "to return to District Court for disposition of his federal questions." *Id.* at 421.

Despite *England*'s clear analogy to plaintiffs forced into state court by *Williamson County*, the First Circuit conclusorily held in *Griffin v. State of Rhode Island*, 760 F.2d 359 (1st Cir. 1985), that a Section 1983 plaintiff cannot reserve federal issues in state court litigation. *See id.* at 360 n.1. Besides creating further conflict among the circuits, the First Circuit

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[8] Although the landowner in *Front Royal* had filed no such reservation, the Fourth Circuit, nonetheless, held that its takings claim was ripe because the state courts had considered and rejected the landowner's "possible rights of action for damages." 135 F.3d at 283. Thus, unlike the Third Circuit and the Sixth Circuit here, the Fourth Circuit did not hold that federal courts may only review takings claims to determine whether state proceedings comport with minimal notions of due process.

[9] *See Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941).

failed to mention that in *Migra* this Court expressly recognized that a Section 1983 plaintiff forced into state court could file an *England*-type reservation "to preserve [its] right to a federal forum for [its] federal claims . . . ." 465 U.S. at 85 n.7.

In sum, the intersection of *Williamson County* and the FFCA has spurred conflicts and confusion within and among the circuits. The Third and Sixth Circuits, for example, believe that *Williamson County* stands for the proposition that lower federal courts may only review ripened takings claims for compliance with due process. By contrast, the Ninth and Fourth Circuits have rejected such a constraint on their jurisdiction. Further, the Fourth, Fifth, and Eleventh Circuits have allowed landowners to reserve federal takings claims during the ripening process, while the First Circuit has rejected such reservations. These and other conflicts point to the pressing need for review and clarification by this Court.

C. The Confusion in the Lower Federal Courts Often Denies Landowners *Any* Meaningful Forum in Which to Seek Just Compensation for Confiscation of Their Property

Over two hundred years ago, James Madison opined that "[g]overnment is instituted no less for protection of property than of the persons of individuals." *The Federalist No. 54*, at 339 (James Madison) (Clinton Rossiter ed., 1961), *quoted in Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1579 (Fed. Cir. 1993). This Court recently echoed this observation, noting that the Fifth Amendment Takings Clause drafted by Madison to protect an individual's property rights is no "poor relation" to other constitutional rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Yet the confusion surrounding *Williamson County* too

often denies landowners any meaningful opportunity to seek just compensation for regulatory takings. The "unclear and inexact" requirements for ripening a federal takings claim[10] often produce lengthy litigation and extraordinary delays in federal court.[11] As a result, "the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 43 (1995).

And even when a landowner first files a takings claim in state court as *Williamson County* commands, lower federal courts have allowed defendant localities to *remove* such claims from state court. Once removed, these lower federal courts then dismiss the takings claim as *unripe* because the landowner did not seek compensation in state court first. *See, e.g., Schulz v. Milne*, No. 95-15703, 1996 WL 570,498, at *2 (9th Cir. Oct. 3, 1996) (dismissing takings claim that had been removed to federal court as unripe because ripeness is a "jurisdictional question," and the "defendants could not confer subject matter jurisdiction on the district court by removal"); *Seiler v. Charter Township of Northville*, _ F. Supp.2d _, 1999 WL 420,985, at *4 (E.D. Mich. June 23, 1999) (dismissing as unripe takings challenge removed to federal court because removal jurisdiction is "separate and distinct" from the ripeness inquiry, although the court "sympathize[d] with Plaintiff's frustration").

Macri v. King County, 110 F.3d 1496 (9th Cir. 1997), illustrates this ping-pong jurisprudence. In *Macri*, the local government defendant removed the landowners' takings claim to federal court. *See id.* at 1498. Once removed, the local

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[10] Robert Meltz, Dwight Merriam, & Richard Frank, *The Takings Issue* 67 (1999).

[11] *See, e.g.*, Delaney & Desiderio, *supra* note 7, at 205.

government turned around and had the takings claim dismissed as unripe because the state court had not ruled on that claim. *See Id.* at 1498, 1500. On appeal, the landowners argued that the takings claim should have been remanded "because, unless the federal claim is considered in state court," the landowners would have been "precluded from bringing the federal claim on the basis of res judicata." *Id.* at 1500. Citing *Dodd I*, the Ninth Circuit affirmed because "the failure of a plaintiff to raise a federal takings claim in state court does not preclude that plaintiff from bringing a subsequent federal takings claim in federal court." *Id.* at 1500-01. But, as noted above, the Ninth Circuit subsequently held in *Dodd II* that collateral estoppel *does* preclude a plaintiff from bringing a federal takings claim in federal court.[12]

II. THE LOWER COURT MISAPPLIED *WILLIAMSON COUNTY*, UNASSAILABLE PRECEPTS OF *RES JUDICATA*, AND THIS COURT'S FULL FAITH AND CREDIT ACT JURISPRUDENCE

The FFCA does not empower federal courts to "give state court judgments greater preclusive effect than would the courts of the State rendering the judgment." *Marresse*, 470 U.S. at 384. But that is what the Sixth Circuit has done here. By misreading *Williamson County* and ignoring Tennessee *res*

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[12] This Court's recent decision in *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997), will likely exacerbate this forum shuffling. There, this Court held that a local government could remove to federal court a case in which a property owner brought federal constitutional (including takings) and state law challenges to a zoning restriction. *See id.* at 529-34. Local governments will undoubtedly seize upon the opinion to bounce landowners between state and federal courts.

judicata principles, the Sixth Circuit barred the Rainey Brothers' ripened federal takings claim, even though the courts of Tennessee would reach no such result.

Tennessee, in accordance with general *res judicata* precepts, only applies *res judicata* if both the prior and later litigation involved the same "cause of action." *See, e.g., Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 & n.11 (Tenn. 1995); 18 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4406 (1981). For purposes of *res judicata*, "cause of action" means all claims actually litigated as well as claims that could have been litigated. *See, e.g., American Nat'l Bank & Trust Co. v. Clark*, 586 S.W.2d 825, 826 (Tenn. 1979).

Yet the Sixth Circuit ignored that, under *Williamson County*, Rainey Brothers did not, and indeed could not, assert a federal takings claim in the prior state court litigation. Tennessee law, in harmony with settled *res judicata* principles, does not bar subsequent litigation of actions that accrue after the conclusion of prior litigation. *See, e.g., White v. White*, 876 S.W.2d 837, 839 (Tenn. 1994) ("[A] party will not be prejudiced by a judgment as to rights not then accrued."); *Lien v. Couch*, 993 S.W.2d 53, 56 (Tenn. Ct. App. 1998), *permission to appeal denied* (May 10, 1999) ("A prior judgment or decree does not prohibit the later consideration of rights that had not accrued at the time of the earlier proceeding . . . ."); *Restatement (Second) of Judgments* § 20(2) (1982) ("A . . . judgment . . . which rests on the prematurity of the action . . . does not bar another action by the plaintiff instituted after the claim has matured . . . unless a second action is precluded by operation of substantive law."); 18 Charles Alan Wright et al., *supra*, § 4412, at 115 (1999 Supp.) ("Matters that could not be litigated in earlier proceedings because premature also should remain open in later proceedings.") (footnote omitted).

Because a federal takings claim requires an additional element not present until state court proceedings conclude, that claim *does not accrue* until after the conclusion of the state litigation. As this Court held in *Williamson County*, "no constitutional violation *occurs* until just compensation has been denied" in the state court proceedings. 473 U.S. at 194 n.13 (emphasis added). In other words, "the property owner *cannot claim a violation of the Just Compensation Clause* until it has used the [state court] procedure[s] and been *denied* just compensation." *Id.* at 195 (emphasis added). Relying on *Williamson County*, at least three circuits agree that a federal takings claim does not accrue until the state court proceedings have concluded. *See Schulz*, 1996 WL 570,498, at *2; *Bidison v. City of Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990).

Thus, *res judicata* could not bar Rainey Brothers' federal takings claim, as that claim had not accrued until the state court litigation had concluded. Instead of recognizing this, the Sixth Circuit barred the Rainey Brothers' ripened federal takings claim. In so doing, the Sixth Circuit gave greater preclusive effect to the prior state court litigation than Tennessee *res judicata* principles require and this Court's precedents forbid.

The Sixth Circuit is not alone. In the Ninth and Tenth Circuits, landowners pointed out that the state law *res judicata* principles at issue in their cases also only bar claims actually made or that could have been made, and thus *res judicata* could not bar their claims because such claims, under *Williamson County*, could not have been made until state court proceedings had concluded. *See Wilkinson*, 142 F.3d at 1322-33; *Palomar*, 989 F.2d at 364.

Rather than analyzing the interplay between *Williamson County* and state *res judicata* principles, the lower courts in this case, as well as the Ninth and Tenth Circuits, have employed two strategies. First, they simply ignore the argument. By *ipse dixit*, the lower courts here asserted that a federal takings claim was raised or could have been raised without even bothering to reconcile this conclusion with *Williamson County*. *See* Petitioner's Brief, App. A, at 6; App. B, at 12; *see also, e.g.*, *Wilkinson*, 142 F.3d at 1324; *Peduto*, 878 F.2d at 728. Second, the lower courts here resort to broad language in *McCurry* and *Migra* to the effect that Section 1983 does not offer an "unrestricted opportunity" to relitigate claims raised in state court. *See* Petitioner's Brief, App. B, at 12-13; *see also Palomar*, 989 F.2d at 364.

McCurry and *Migra*, however, are inapposite. In *McCurry*, this Court held that the FFCA required a federal court to apply state collateral estoppel rules to a Section 1983 claim brought for a Fourth Amendment violation when that Fourth Amendment violation had previously been raised in a prior state proceeding. *See* 449 U.S. at 91-105. Subsequently, in *Migra*, this Court held that the FFCA required a federal court to apply state *res judicata* rules to a Section 1983 claim for alleged violations of the First Amendment, Due Process Clause, and Equal Protection Clause. *See* 465 U.S. at 77-88. Neither case, therefore, involved a constitutional violation, such as a takings claim, that requires, as an element of recovery, prior litigation in state court.[13] As already noted, this element of recovery does not accrue until *after* state court proceedings conclude; thus, *McCurry* and *Migra* did not analyze whether the state *res judicata* laws at issue would bar a claim that arises *after* prior state litigation.

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[13] *See supra* note 4 and accompanying text.

Furthermore, *Migra*, which was decided after *McCurry*, explicitly limited the FFCA's imposition of state *res judicata* rules to cases where the "petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." 465 U.S. at 84-85. In stark contrast, *Williamson County* prevents takings petitioners from doing precisely that. Accordingly, *Migra* fails to answer the unresolved question of whether the FFCA requires the imposition of state preclusion rules when this Court's jurisprudence requires initial litigation in state court.

CONCLUSION

For the above reasons, the *amicus* respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 99-60

In the
Supreme Court of the United States
October Term, 1999

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

MEMPHIS AND SHELBY COUNTY OF ADJUSTMENT and CITY OF MEMPHIS, TENNESSEE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Where a plaintiff-landowner seeks relief from a regulatory taking of its property and, as required by this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), proceeds to "ripen" its case by first seeking (and being denied) compensation in the state courts before seeking relief under 42 U.S.C. § 1983 in federal court, may a United States district court nonetheless dismiss such an action on the ground that the very process of "ripening" the case in the state court litigation—in the manner required by *Williamson County*—simultaneously works to bar it under the doctrine of *res judicata*?

2. *A fortiori*, may a United States district court so rule where it is conceded in open court that, in depriving the plaintiffs of their constitutional rights, the defendant municipality acted "arbitrarily, capriciously, and illegally" and where the municipality "in essence . . . stipulated that [it] had violated plaintiff's rights under both the Tennessee and United States Constitutions" (App. B, P. 8)?

3. Was it this Court's intention in *Williamson County* to single out American property owners as the *only* class of plaintiffs whose 42 U.S.C. § 1983 claims may *never* be heard in federal court, because the required process of "ripening" their causes of action in state court simultaneously serves to bar them from federal court, as held by the court below, which thereby intensifies a wide-ranging conflict of decisions in which the Third, Sixth, Ninth, and Tenth Circuits disagree with the Fourth, Fifth, and Eleventh Circuits?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, attorneys for Pacific Legal Foundation have also represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997); and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years.

In particular, PLF attorneys have represented and supported individuals seeking, unsuccessfully, to utilize federal courts for redress from state-imposed uncompensated regulatory takings. *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.), *cert. denied,* 119 S. Ct. 278 (1998) (represented Dodds); *Sinclair Oil Corporation v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 1386 (1998) (amicus); *Macri v. King County,* 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1178 (1998) (amicus).

Finally, Pacific Legal Foundation attorneys are also currently representing Mr. Bailey Jones in a petition for certiorari before this Court in *Jones v. City of Berkeley*, Supreme Court Docket No. 98-1774, another case in which a court denied a property owner relief for a regulatory taking.

Because of the Foundation's experience with Takings Clause litigation, it can contribute a unique perspective to this

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and ,furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Court as it determines whether to grant Rainey Brothers Construction Company's petition for writ of certiorari.

Counsel for Petitioner and Respondents have granted consent to file this brief and letters of consent are lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case.

INTRODUCTION

The federal courts serve a critical function in protecting individual liberties from overbearing and oppressive governmental excesses—except when those excesses trench on the rights associated with the ownership of property. State courts do not have the last word on whether state or local officials have unconstitutionally infringed on a liberty protected by the Bill of Rights—except for state courts in those jurisdictions where the federal courts have turned their back on the rights of property owners. Admittedly, the workload of the federal courts is heavy. Congress' desire to federalize all manner of crimes and misdemeanors has taken a toll on the ability of the federal courts to manage their dockets. But should that toll be passed onto the shoulders of the owners of property? The rights of property ownership may not be universally appreciated by governmental agencies. The battles between landowners and governmental bodies can be long and contentious. Landowners who seek to develop property do not always win popularity contests. But, since the unpopularity of a class is never a reason to bar the doors of the federal courthouse, it behooves this Court to consider seriously the reasons why it is now virtually impossible for property owners to vindicate their federally protected rights in federal court.

REASONS FOR GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), this Court explained that a property owner who allegedly suffers an uncompensated regulatory taking at the hand of state or local officials must ripen a Takings Clause claim before going to federal court by first utilizing whatever remedies the state courts provide. *Id.* at 194-95. Only after failing to obtain relief in the state court system may the landowner seek relief in federal court. *Id.* At one time, this rule may have seemed sensible. But, in more recent years, as the lower federal courts have woven the *Williamson County* ripeness doctrine together with the principles of res judicata and collateral estoppel, it has become all too apparent that *Williamson County* is seriously flawed.

This brief will explain first the conflicting and harsh results the lower courts have wrought by combining the ripeness doctrine of *Williamson County* with the principles of res judicata and collateral estoppel. Next it will show the flaws that underlie *Williamson County's* explication of the ripeness doctrine for regulatory takings claims. Most significantly, the *Williamson County* decision cannot be harmonized with the long-established principle that a takings claim accrues when a government action affects the use or ownership of property and not when a claim for damages is litigated.

ARGUMENT

I

BECAUSE OF THE COMBINATION OF WILLIAMSON COUNTY WITH THE DOCTRINES OF ISSUE AND CLAIM PRECLUSION, PROPERTY OWNERS CANNOT LITIGATE REGULATORY TAKINGS CLAIMS IN FEDERAL COURT

In many jurisdictions landowners are at a complete loss when it comes to determining how they can get their takings claims heard in federal court. It is not for want of trying. The example of Rainey Brothers is only the latest in an ever lengthening series of cases where landowners have been denied an effective hearing of their federal claims in federal court.

Take the case of Thomas and Doris Dodd, chronicled variously in *Dodd v. Hood River County*, 855 P.2d 608 (Ore. 1993) (*Dodd I*), *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd II*), *on remand*, 136 F.3d 1219 (9th Cir.) (*Dodd III*), *cert. denied*, 119 S. Ct. 278 (1998). After purchasing 40 acres in Hood River County, Oregon, the Dodds sought to build a home for their retirement. *See Dodd II*, 59 F.3d at 856. But between the time they purchased their land and the time they sought permission to build their home, the zoning laws changed. Their property was declared "forest use zone" and no structures could be built unless "necessary and accessory" for timber harvesting purposes. *Id.* Since estimates of the timber on the property ranged from $692 (the Dodd's expert timber appraiser) to $10,000 (a county employee who drove by the property), the County determined that the Dodds' home was (obviously) unnecessary for timber harvesting and denied the permit. *See Dodd III*, 136 F.3d at 1224.

At this point PLF attorneys, representing the Dodds, pondered their next step. The courts in Oregon were notorious in having never seen a regulatory takings claim that they liked. The only possible avenue of relief was the federal court. But

first there was the matter of *Williamson County*. So after completing the state administrative procedures, the Dodds sued in state court, expressly reserving any and all federal causes of action pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *See Dodd II*, 59 F.3d at 857 and 862. Then they sued in federal court on those federal claims.

The federal case was stayed pending the outcome of the state case. *Dodd III*, 59 F.3d at 857 and 862. As expected, the Dodds lost in state court. *Id.* at 857. Upon resuming the federal court action the County argued that the doctrine of claim preclusion or res judicata should prevent the Dodds from litigating in federal court because a takings claim in state court was similar to the federal takings claim. The Ninth Circuit disagreed. It found that, because the federal Fifth Amendment takings claims were distinct from the state takings claims, the Dodds could proceed. *Dodd II*, 59 F.3d. at 862.[2] But the court opined that the doctrine of collateral estoppel or issue preclusion might apply instead and remanded the case. *Id.* at 863-65.

Once the case reached the Ninth Circuit again after the remand, the Dodds were told that collateral estoppel did indeed bar any litigation of the substance of any federal takings claim, despite the Dodds' protestations that the standards employed by the Oregon courts in determining whether there has been a regulatory taking are markedly different from the standards employed by the federal courts. *Dodd III*, 136 F.3d at 1227-30.

It is a different story in the Sixth Circuit. In *Rainey*, of course, the claimant did not utilize the device of an *England*

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[2] In *Dodd II* the court did not reach the question of whether a reservation based on *England v. Louisiana State Board of Medical Examiners* was necessary or effective. In *Dodd III*, it implied it was ineffective to counter the doctrine of collateral estoppel. 136 F.3d at 1227.

reservation (that the Dodds found to be ineffective in *Dodd II*). And unlike the Ninth Circuit, the court did not reach the question of whether collateral estoppel served as a bar to bringing a federal takings claim in federal court. Instead, the Sixth Circuit found that the doctrine of res judicata bars the litigation of Rainey Brothers Construction's federal takings claims in federal court—a holding diametrically opposed to *Dodd* in everything but ultimate result (the landowner loses). *Rainey Brothers Construction Company v. Memphis and Shelby County Board of Adjustment*, No. 97-5897, 1999 WL 220128, at *2 (upholding the "district court [judgment that] held the state court decision was indeed a decision on the merits and entitled to preclusive res judicata effect").

Whether it be collateral estoppel or res judicata, the result is the same for the landowners: they lose. As a practical matter it is impossible to get these federal courts to conduct an independent evaluation of whether a state or local regulation of property effects an uncompensated regulatory taking as proscribed by the federal Constitution. Unless this Court is to countenance the unavailability of the federal courts to litigants seeking to bring a regulatory takings claim based on the Fifth and Fourteenth Amendments, the doctrines of res judicata and issue preclusion must either be abandoned or modified in the context of *Williamson County*. Amicus respectfully suggests that the better answer is that *Williamson County* itself must be rethought. The next section will suggest that this Court can use the *Rainey* case as a vehicle for reevaluating *Williamson County*.

II

IT IS TIME FOR THIS COURT TO REEVALUATE ITS HOLDING IN WILLIAMSON COUNTY

There is a well-established principle that a claim for just compensation for a taking of private property accrues "at the time of [the] taking." *Danforth v. United States*, 308 U.S. 271, 284 (1939). Nevertheless, *Williamson County* has sown

confusion in this area, treating takings claims against state and local governments essentially nonaccrued until state remedies are pursued. When combined with the doctrines of res judicata or collateral estoppel, the takings claims cannot be litigated once they "accrue" for purposes of federal litigation. By predicating the *Williamson County* ripeness decision upon an erroneous assumption concerning when a takings claim accrues, this Court adopted a doctine of ripeness in *Williamson County* that has led to harsh and unsound results, such as in *Rainey Brothers* and *Dodd.*

The *Williamson County* Court

> granted certiorari to address the question whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations.

473 U.S. at 185.

But this Court did not decide the case on the questions presented. Instead, *Williamson County* left the temporary takings issue "for another day," concluding that the property owner's claim for just compensation was "premature." *Id.* at 186. The primary basis for this conclusion was the Court's application of the rule that a regulatory takings claim

> is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Id. As the Court explained at length, *see id.* at 186-94, this rule had its antecedents in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); and *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981).

After having explicated the final decision requirement, the Court in *Williamson County* concluded that the petitioner planning commission's

> denial of approval does not conclusively determine whether respondent [property owner] will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

473 U.S. at 194. The opinion could have stopped at that point, but it did not. Without the benefit of briefing, the opinion posited a "second reason [why] the taking[s] claim is not yet ripe," namely, that the property owner "did not seek compensation through the procedures the State has provided for doing so." *Id.* As will be shown, this aspect of *Williamson County* deviated sharply from the Court's established Just Compensation Clause jurisprudence. Granting the petition for writ of certiorari would present a good opportunity for the Court to modify the unworkable state procedures requirement of *Williamson County*.

The *Williamson County* decision failed to acknowledge what has been the consistent rule of this Court for many decades: the government's taking of private property and the government's obligation to pay just compensation for such taking are concomitant, coming into being at the same time. This Court has, of course, formulated the rule in varying terms: the event of taking "gives rise to the claim for compensation," *United States v. Dow*, 357 U.S. 17, 22 (1958); *United States v. Clarke*, 445 U.S. 253, 258 (1980); compensation becomes due "at the time of taking," *Danforth*, 308 U.S. at 284; "an obligation to pay for" the land arose "when it was taken," *United States v. Dickinson*, 331 U.S. 745, 751 (1946); the claim for just compensation "accrued at the time of the taking," *Soriano v. United States*, 352 U.S. 270, 275 (1957), the government's duty to pay just compensation is triggered "[a]s soon as private property has been taken," *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621, 654 (1981)

(Brennan, J., dissenting). The *Williamson County* opinion put forth two reasons for silently departing from this longstanding rule, for labeling as "premature" a claim that *Soriano* (for example) had called "accrued." Both of these reasons were based on a misreading of precedent.

First, the opinion cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984), for the proposition that this Court has

> held that takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act.

Williamson County, 473 U.S. at 195. But if "takings claims" are meant here to refer to monetary claims for just compensation for a completed taking of private property, then the cited passage from *Monsanto* did not even consider such claims, let alone declare them "premature" until after the property owner had sued under the Tucker Act.[3]

In *Monsanto*, the company brought suit in federal district court "seeking *injunctive and declaratory relief* from the operation of" various provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), alleging that "all of the challenged provisions effected a '*taking*' of property without just compensation, in violation of the Fifth Amendment."

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[3] The Tucker Act grants jurisdiction to the Court of Federal Claims to adjudicate "any claim against the United States founded upon . . . the Constitution." 28 U.S.C. § 1491(a)(1); *see also id.* § 1346(a)(2) (granting the district courts concurrent jurisdiction over such claims "not exceeding $10,000 in amount"). It is this jurisdictional grant that authorizes the Court of Federal Claims to hear and determine monetary claims against the United States for just compensation. *See, e.g., United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to determine.").

467 U.S. at 998-99 (emphasis added). Having first concluded that some of the challenged provisions might possibly operate to take Monsanto's property in certain circumstances, the Court went on to consider (in the passage later cited by the opinion in *Williamson County*) whether that conclusion afforded a basis for granting Monsanto the injunctive relief it had sought. The *Monsanto* Court ruled that it did not, based on the established rule that

> [e]*quitable relief* is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking.

467 U.S. at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could indeed be brought pursuant to the Tucker Act).

So Monsanto's claim for equitable relief under the Fifth Amendment was not *premature*, that form of relief was *not available* at all. As for a Tucker Act suit against the government in the Court of Federal Claims, asserting a *monetary* claim against the government, the *Monsanto* Court observed that the company could proceed to the Court of Federal Claims "[o]nce a taking has occurred." *Id.* at 1020.

It is inaccurate to state that a takings claim for just compensation against the federal government is not ripe until a claimant files a Tucker Act claim in federal court—because *that* filing is the claim for monetary relief. The *Williamson County* decision, therefore, read into *Monsanto* a conclusion about ripeness in the federal courts that was never intended and that is logically unsound.

The opinion in *Williamson County* attempted to translate the unsound proposition that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act" into an analogous proposition at the state level:

> Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. But if, as demonstrated above, the former proposition is erroneous, the latter is wrong as well. Indeed, the latter proposition creates its own, easily demonstrable logical difficulties.

Consider the typical state-law "procedure for seeking just compensation" against the state, namely, an inverse condemnation action against the state in its own courts. As to whether that state-court action is intended by the state to satisfy its *federal* constitutional obligation to pay just compensation for a taking, there are only two possibilities. First, if the "procedure" is simply a willingness on the part of state courts to adjudicate *federal* constitutional claims, then we have a situation analogous to the Tucker Act in the federal courts: it is illogical to state that a federal claim against the state (in state court) for just compensation is "premature" until the property owner has pursued a federal claim (in state court) against the state for just compensation.

On the other hand, if the state-court action is *not* intended by the state to satisfy its obligations under the Just Compensation Clause—if the "procedure" is rather one to enforce a right that arises under *state* law—then we have a situation where a property owner with a concededly "accrued" federal claim for just compensation is forced to postpone the assertion of that claim and pursue a state-law claim instead.

The notion that state compensation must be first pursued to determine whether there has been a violation of the federal Constitution in the first place is contrary to the established case law holding that the takings claims accrue at the time of the regulatory action that denies use of property. But, even if it

were more convenient to postpone federal proceedings in order to find out whether state law compensation will be paid, this is no reason to apply issue or claim preclusion to separate federal takings claims.

There may well be good reasons, grounded in considerations of comity and federalism, for such a postponement. But contrary to the assertion in *Williamson County*, these reasons have nothing to do with the "nature of the constitutional right" to just compensation. 473 U.S. at 195 n.13. Consistent with *Dow*, *Clarke*, *Danforth*, *Dickinson*, and *Soriano*, no court treats federal claims for just compensation for completed takings of property as *inherently* unripe or premature. That is, there is no state judicial system that refuses to adjudicate *federal* claims for just compensation on the ground that they are unripe or premature until a property owner has first pursued to completion all claims for compensation under *state* law. It is not difficult to cite numerous counter examples of state judicial systems that will hear and determine *federal* claims for just compensation *as soon as* a taking has occurred.[4] This Court, moreover, has routinely exercised jurisdiction to review state-court judgments concerning such claims without suggesting that the claims were unripe or premature because the property

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[4] *See, e.g., Jacobs Wind Electric Co. Inc. v. Department of Transportation*, 636 So. 2d 1333, 1337 (Fla. 1993) (contemplating that a patent holder would assert its claims under the Just Compensation Clause *along with* its claims under the state analogue and under state common law); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 855 (Cal. 1997) (observing that property owner brought a claim for "'just compensation' in the form of lost rental income and interest" under both "article I, section 19 of the California Constitution and the Fifth Amendment of the United States Constitution"), *cert. denied*, 118 S. Ct. 856 (1998); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1997) (finding ripe the property owner's "just compensation takings claims" brought at the same time "under the United States Constitution and [the] Texas Constitution").

owner had not *first* pursued claims for compensation under state law.[5]

The second basis for *Williamson County*'s rejection of the longstanding rule that claims for just compensation arise at the time of the taking was a supposed analogy between takings of private property "without just compensation" and deprivations of property "without due process of law." *See* 473 U.S. at 195. Where a person suffers a deprivation of property through "a random and unauthorized act by a state employee," the state's action "is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

Even assuming the validity of the analogy between the Just Compensation Clause and the Due Process Clause, *Hudson* does not provide the correct frame of analysis. That decision was premised on the fact of "a random and unauthorized act by a state employee." As even the opinion in *Williamson County* recognized, *Hudson* has no applicability to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure." *Id.* at 195 n.14. A taking is always effected pursuant to an established state policy or pro-

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[5] *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992) (property owner did not first pursue state-law remedies for compensation; rather, once the regulatory agency had made final decision, owner "promptly filed suit in the South Carolina Court of Common Pleas" seeking just compensation for regulatory taking); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 308-09 (1987) (little more than a month after the ordinance was adopted, property owner brought action simultaneously seeking damages in tort and just compensation for a regulatory taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982) (without first pursuing separate state-law remedies for compensation, property owner sued seeking damages for trespass and just compensation for government-sponsored physical invasion).

cedure; if the relevant injury to property results from a truly random and unauthorized act by a government employee, the property owner has suffered a tort, not a taking. In any event, the very notion that a state's action is somehow not "complete" until after the property owner avails himself of state-law compensation procedures cannot be reconciled with the rule that a state's taking of property, without more, gives rise to a "right to recover just compensation" on the part of the owner and a corresponding "obligation to pay just compensation" on the part of the state. *First English*, 482 U.S. at 315. Thus, while a postdeprivation remedy might allow the government to avoid liability for a denial of due process, once a taking has occurred, liability is unavoidable: "no subsequent action by the government can relieve it of the duty to provide compensation." *Id.* at 321 (internal quotation marks omitted).

The state-procedures portion of *Williamson County* has proved "unworkable," having "created confusion among the lower courts." *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63, 64 (1996). Federal courts of appeals have been forced into contortions to describe what, how, or if property owners might somehow "reserve" their federal claims for just compensation for a federal forum when they are forced by *Williamson County* to proceed in state court.[6] Moreover,

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[6] *See, e.g., Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989); *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Dodd v. Hood River County*, 59 F.3d 852; *Wilkinson v. Pitkin County Board of County*

(continued...)

even if property owners can manage to salvage the *formal* right to bring their federal claims in federal court, they may effectively lose that right through application of the rules of issue preclusion, *see, e.g., Dodd v. Hood River County*, 136 F.3d at 1227 ("Nor does the Dodds' previous reservation of this federal takings claim . . . prevent operation of the issue preclusion doctrine."), *cert. denied*, 119 S. Ct. 278 (1998), or claim preclusion, *see, e.g., Rainey Brothers*, 1999 WL 220128, at *2 ("preclusive res judicata effect").

In applying issue preclusion in *Dodd*, the Ninth Circuit has equated the state takings question, whether a land-use regulation "allows a landowner some substantial beneficial use of his property" for purposes of the compensation provision of the Oregon Constitution, with the federal takings question of whether "a land owner has been deprived of 'economically beneficial uses' of his property" for purposes of the Just Compensation Clause of the United States Constitution. 136 F.3d at 1225. In so doing, the court deprived the property owner of an opportunity *ever* to present its federal claims for a categorical taking to a federal court.

In applying claims preclusion in *Rainey Brothers*, the Sixth Circuit equated the rejection on procedural grounds of a regulatory taking claim in state court with the rejection on the merits of such a claim even when the state court procedural decision is admittedly "erroneous." 1999 WL 220128, at *3.

These kinds of decisions can be expected to multiply, given that nearly every state has a compensation provision that is (or has been interpreted to be) very similar to the Just Compensation Clause.

The combined effect of *Williamson County*, and the application of issue and claim preclusions, is to drive out of

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[6](...continued)
Commissioners, 142 F.3d 1319 (10th Cir. 1998); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992).

federal court virtually all federal claims for just compensation for takings of private property by state and local governments. This result is wrong on its face, and it is especially disturbing in light of the Court's firm refusal, with respect to *other* federal claims brought pursuant to 42 U.S.C. § 1983, to

> require[] exhaustion of state *judicial* or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.

Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (emphasis added), *quoted in Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982).

In actual practice, the state-procedures aspect of *Williamson County* has effectively caused the Just Compensation Clause, "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, [to] be relegated to the status of a poor relation," notwithstanding the Court's protestations to the contrary in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This is an unwarranted result.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: July, 1999.

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No. 99-60

In The

Supreme Court of the United States

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,

Petitioner,

vs.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT; AND CITY OF MEMPHIS, TENNESSEE,

Respondent's.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the doctrine of *res judicata* bar a claim for relief under 42 U.S.C. § 1983 in federal court when the case has "ripened" in state court pursuant to this Court's decision in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank?*

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defender's was founded in 1991 as a non-profit, public interest law foundation whose members are property owners, users, and beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights participates in legal actions affecting the public interest and private property rights. Defenders of Property Rights engages in litigation across the country on behalf of its membership to stem government incursion forbidden by the Fifth Amendment.

Defenders has devoted a significant portion of its resources to the litigation of these issues to ensure that property rights, the cornerstone of any democracy, are preserved. Defenders of Property Rights has participated in every significant property

[1] Counsel for either party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

rights case before this Court since its founding including *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624 (1999), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Amicus curiae herein adopts Petitioner Rainey Brothers Construction, Co., Inc., statement of the case. (*See* Pet'r Pet. for Cert. at 3-7.)

SUMMARY OF ARGUMENT

This case affords this Court an opportunity to provide badly needed guidance as to whether the requirement that a plaintiff first seek review of his taking claim in state court before filing in federal court—as set forth in *Williamson County Reg. Plan. Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985)—requires modification in light of more recent decisions by this Court.

Williamson County places two ripeness hurdles in the way of a taking claim brought in federal court against states and their political subdivisions. The first requirement of *Williamson*

County, that a claimant exhaust state administrative remedies before filing an action in federal court, was satisfied in this case. The second, and independent, requirement of *Williamson County* dictates that plaintiffs "seek compensation through the [judicial] procedures the State has provided for doing so" before turning to the federal courts. *Id.* at 194. Neither *Williamson County* nor have subsequent takings decisions by this Court treated *Williamson County* as mandating a jurisdictional requirement.

Had the court below treated the second prong of *Williamson County* as a prudential matter, it would have been required to defer to the trial court's factual determination that the case was sufficiently concrete for adjudication by the court, especially now that the case has been fully tried on previous occasions and reviewed on appeal. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (ripeness treated as a prudential rather than a jurisdictional issue.) Moreover, the court below ignored the fact that Petitioners originally filed this lawsuit in state court, and were prevented from pursuing the case when Respondent removed the action to federal court in October of 1989 on the ground that the action to federal question arising under the Fifth

Amendment to the United States Constitution and thus did not belong in state court. Likewise, at the time the lawsuit was filed, the State of Florida recognized no cause of action for inverse condemnation, rendering his state action futile as well as impossible.

By failing to understand *Williamson County* in light of later decisions of this Court, the court below has joined many federal courts across the nation which continues to apply *Williamson County* as if takings jurisprudence had not developed beyond the state of law in 1985. As discussed below, the holding in *Williamson County* has been interpreted inconsistently by federal courts as a jurisdictional, prudential and even a procedural requirement. Much of the inconsistency and confusion arises from the uncertainty at the time of *Williamson County* decision surrounding the fundamental nature of a just compensation case. This Court has addressed many of these questions since 1985. Indeed, while it may now be fairly said that the *Williamson County* decision is inconsistent with this Court's subsequent holdings in important respects, some lower courts continue to apply *Williamson County* as if subsequent decisions had not

answered many of the open questions. Thus, the time has come for this Court to reexamine *Williamson County* in light of subsequent holdings of this Court, including *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), all of which have fleshed out the elements of a Fifth Amendment cause of action.

As this Court has held on numerous occasions, the obligation for just compensation attaches whenever government action works a taking of private property rights. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of just compensation to which he is entitled. *First English*, 482 U.S. 304 (1987); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

In short, subsequent decisions of this Court have determined that the Fifth Amendment cause of action arises at the time the administrative decision becomes final as a matter of fact.

Nothing in those decisions suggest that the cause of action is incomplete until after the plaintiff had litigated his case in state court, nor do they stand for the proposition that a plaintiff whose state court case is removed to federal court is thereby defeated because the federal court lacks jurisdiction. Although *Williamson County* may have been a good guess at what was to come in Fifth Amendment jurisprudence in 1985, subsequent decisions of this Court require that *Williamson County* be revisited in light of current Fifth Amendment jurisprudence. Accordingly, Amicus Curiae urges this Court to grant this Petition for review and declare that their case has satisfied the prudential concerns of the state exhaustion ripeness requirement set forth by this Court in *Williamson County*, or, alternatively, to reverse summarily the opinion below as inconsistent with this Court's subsequent holdings in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)*, and *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)*.

Reason For Granting the Petition

An oddly perverse result occurs, which this case well illustrates, when the *Williamson County* ripeness doctrine combines with *res judicata* principles, barring a plaintiff from "relitigating" the takings claim which they filed in state court in obedience to the second ripeness hurdle. Under this "catch-22", a plaintiff must first file in state court (Williamson County) and, having litigated his claim to judgment, will be dismissed from federal court precisely because he did so. Thus, a plaintiff may be barred from bringing his constitutional claim to federal court—either because he has not yet litigated it in state court first, or because he has done so. *See generally* Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers, in* Institute on Planning, Zoning, and Eminent Domain § 7 (Matthew Bender 1991) and Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning & Planning Law Report 57 (1990). For example, in *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993), a property owner filed suit in state court

to challenge a mobile home rent control ordinance as an unconstitutional taking. He lost. The plaintiffs then filed in federal court, where the case was dismissed on the grounds of *res judicata*:

> Palomar's first argument that its takings claim cannot be barred because it was not ripe until the state court ruled on its claim, lacks merit. Palomar correctly interprets *Williamson County*, to require that a plaintiff take its takings claim to start court before the case will be ripe for federal adjudication. However, this requirement does not prevent the doctrine of *res judicata* from barring subsequent federal action..."Appellants have exhausted their state claims, which, under *Williamson*, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims against the City in state court. Due process guarantees them no less, but entitles them no more."...We are compelled to conclude that *res judicata* bars Palomar's claims in federal court, despite the requirements of *Williamson*.

Id. at 364-365 (citations omitted), *quoting Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d. Cir. 1989) (subsequent federal claim for just compensation was also barred by the doctrine of *res judicata*). *Accord Mission Oakes Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993).

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) the neighbors of the Tampa Airport sought compensation in state court for the taking of noise and aviation

easements over their properties. They restricted their state lawsuit to Florida law, and raised no claims under the federal constitution. Having lost their suit at the state level, they filed their lawsuit in federal court, raising their federal claims. The case was dismissed as being barred by *res judicata* and collateral estoppel. The *Fields* court correctly framed the issue which must be resolved by this Court:

> This case presents a jurisdictional problem created by the interplay between 28 U.S.C.A. § 1738 and the Supreme Court's holding in *Williamson County*. On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation before bringing suit in federal court under section 1983 for claims arising under the Fourteenth and Fifth Amendments for the taking of property without just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize *res judicata* and collateral estoppel doctrines that would require a state court litigant to raise his federal law claims with the state claims, on pain of merger and bar of such federal claims in any attempted future proceeding.

Id. at 1302-03 (citations omitted). *Cf. New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993) (case was not time-barred because it was premature to file in federal court until state litigation was complete).

Thus, a broad application of the second prong of the *Williamson County* ripeness requirement is not only a time-wasting hurdle for the courts and litigants, but may, in fact, bar altogether federal court adjudication of their Fifth Amendment claim for just compensation. While *Williamson County* may have been originally intended to require the litigation of state issues in state court, leaving the federal forum available in those instances where the state failed to provide compensation for a violation of the takings clause, the ripeness requirement was never intended to bar altogether Fifth Amendment litigants from federal court. Indeed, it would be anomalous to suggest that a right guaranteed by the United States Constitution could not be litigated in federal court. *See Jacobs v. United States*, 290 U.S. 13 (1933) (inverse condemnation suit rests on the Fifth Amendment and is therefore based on the Constitution).

In order to avoid such a result, some circuits have interpreted *Williamson County* narrowly, holding that it only applies in claims for just compensation. *See, e.g., Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991) (aggrieved landowner asserted deprivation of procedural due

process so his action was ripe even though he did not exhaust administrative remedies).

Granting *certiorari* in this case would help to provide guidance and uniformity of lower court decisions on a crucial constitutional question. The views of the lower appellate courts are often contradictory in nature resulting in constitutional justice being applied unevenly depending on geographical presence. The Third, Sixth, Ninth and Tenth Circuits have been the most strict in applying the doctrine of *res judicata* to prevent litigants from trying to exercise their rights under the Fifth Amendment and 42 U.S.C. §1983. [*See, E.g., Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 264-265 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-728 (3d Cir. 1989)].

The Fourth and Eleventh Circuits avoid *res judicata* by allowing property owners to file initially in federal court while filing a "reservation" in state court. This "reservation" allows the state court to hear issues of state law while reserving federal constitutional issues to be decided later by a federal trial. [*See*

Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976)].

The Ninth Circuit, in particular, has vacillated about which approach to take. It hinted at accepting the approach of the Fourth and Eleventh Circuits in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd I*). However, in *Dodd II* it went back to its old approach of treating *Williamson County* as being a basis for *res judicata*. *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (Dodd II).

It is clear that the lower courts need guidance in this area. Arguing simply from an efficiency standpoint neither system works well. The Ninth Circuit approach will have certiorari petitions to this Court increase dramatically if it is the only avenue of appeal from a state court decision in property rights cases. The Fourth and Eleventh Circuits tie up two court systems for the sake of balancing constitutional rights with the requirements of *Williamson County* and the traditional notions of judicial restraint.

From a constitutional point of view, "(t)he Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants." Mandelker, Gerard, & Sullivan, *Federal Land Use Law* §4A.02(6) at p. 4A-21 (Clark, Boardman, Callaghan 1998).

The role of the court as the final interpreter of the Constitution and the grant of federal courts to have original jurisdiction under 28 U.S.C. § 1332 for federal questions is severely undermined if *res judicata* is allowed to prevent property owners from receiving just compensation for governmental takings.

A review of the use of *Williamson County* ripeness bar utilized by lower courts severally undercuts the notion of the federal courts as being the protector of federal constitutional rights. The result on property owners is an unsure future. Between 1990 and 1997 federal courts used the *Williamson County* ripeness doctrine to refuse to review over 90 percent of all cases that dealt with land-use taking issues. Alex F. Annett, The Heritage Foundation, *How Congress Can End the "Regulatory Limbo" Blocking Property Owners' Access to*

Justice, FYI No. 154 October 1, 1997. *See also* Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Court's Will Go to Avoid Adjudicating Land Use Cases* 10 J.Land Use and Envt'l L. 91, 92 (for cases showing the lengths some federal courts will go to avoid hearing property rights cases).

The effect on landowners is painfully obvious. They are the only class of individuals in a Section 1983 that are singled out "ripen" their case in this manner. However, as this case demonstrates, if the state has a procedure to address the taking then they are barred by *res judicata* from litigating in federal court even if the state court has found that a taking has occurred but has failed to order just compensation. Property rights are the only area where states and localities are allowed to ignore the constitutional requirement that a taking requires just compensation. Until this Court reviews its decision in *Williamson County* and clarifies how it is affected by *res judicata,* this unconscionable situation will continue to the detriment of private property rights.

CONCLUSION

For the forgoing reasons, the judgment of the court below should be reversed.

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Supreme Court of the United States

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT; AND CITY OF MEMPHIS, TENNESSEE,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF

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INTRODUCTION

The Respondents' Brief filed by the Memphis and Shelby County Board of Adjustment and the City of Memphis evades the Petition's focal point:

- this Court's decision in *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985) promises property owners a federal forum to litigate their 5th Amendment takings cases after they "ripen" those cases through state court litigation; however
- cases like this one from the Sixth Circuit (and others, as discussed in the Petition) refuse to permit federal court litigation, concluding that the process of "ripening" the federal case in state court bars it altogether through the operation of either claim or issue preclusion.[1]
- In other words, Respondents' view of the law renders *Williamson County's* rule self-stultifying; by their lights, a federal case is "ripe" only for dismissal. That result simply makes no sense.

None of the arguments presented by the City and the Board comes to grips with this fundamental defect in takings law, or the conflict that has been created by the Courts of Appeals as they try to blend this Court's *Williamson County* decision with doctrines developed for other contexts. After 15 years of lower

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[1] The problem is particularly acute here, where the state case was dismissed solely on erroneous *procedural* grounds.

court floundering, it is time for this Court to tell the lower federal courts just how the *Williamson County* rule is supposed to operate. Both commentators and courts are in substantial agreement that the "ripening" process envisioned by this Court in 1985 is not working. Instead, it is too often acting as a trap for property owners who seek vindication of their federal constitutional rights. They find themselves shut out of the very courts whose doors were supposedly "throw[n] open" to them by 42 U.S.C. § 1983. (See *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504[1982].) That simply isn't right.

I

WILLIAMSON COUNTY CREATED A SPECIAL CLASS OF PLAINTIFFS (PROPERTY OWNERS) WHO, ALONE AMONG CONSTITUTIONAL CLAIMANTS, ARE REQUIRED TO "RIPEN" FEDERAL COURT CASES IN STATE COURTS. IN THAT LIGHT, STANDARDS OF CLAIM AND ISSUE PRECLUSION MUST BE APPLIED SO THAT THE FEDERAL RIGHT OF ACTION IS ACTUALLY "RIPENED," NOT DESTROYED.

The City/Board arguments, albeit forcefully made, make Rainey Brothers' point. Their mechanical application of ordinary precepts of claim and issue preclusion (or *res judicata* and collateral estoppel) will derail any effort by property owners to comply with this Court's *Williamson County* instructions and seek compensation in state court as a precondition to later litigating federal law issues in federal court. The interplay is obvious, because the underlying facts will almost always be the same. Here, for example, the claims Rainey Brothers made in the Tennessee courts were premised on the same unconstitutional

actions as the federal claims. Only the legal basis for recovery differed. More importantly, when Rainey Brothers presented its case in state court, the facts were not litigated there. Instead, the state courts refused to grant any hearing on the substance and dismissed the case procedurally on erroneous and unconstitutional grounds, all in violation of federal due process rights. Then the Federal District Court said that a motion to dismiss constituted an appropriate time to apply both claim and issue preclusion.

However, if this Court meant what it said in *Williamson County*, a different result must obtain. Otherwise, property owners will become a class of legal pariahs who — unlike any other American plaintiff — can *never* have their *federal* claims adjudicated in a *federal* court. As shown in the Petition (pp. 11-13), this Court carefully chose its language in *Williamson County*, and delivered the clear message that landowners *could* try their federal constitutional claims once they had "ripened" their case by first seeking compensation in state court. (473 U.S. at 185, 186, 194, 195, 197, 200.) That process can only work if this Court instructs lower federal courts that they are required to hear ripe cases on the merits. Instead, the situation below only produces confusion, injustice, and unfairness that leads landowners to conclude that they were duped by *Williamson County*. As two seasoned commentators summarized it:

> "Reliance on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over." (Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and*

Principles of Res Judicata, 24 Urban Lawyer 479, 480 [1992].)

"This unfortunate result has produced an outcry from litigants who incorrectly assumed that compliance with [*Williamson County*] would eventually give them their day in federal court." (Laitos, *Law of Property Rights Protection* § 10.05[A][5], p.10-25[Aspen Publishers 1999].)

The arguments presented here by the City and the Board simply confirm the anomalies that flow from mechanically applying doctrines of preclusion. The law, contrary to the labored City/Board arguments, is equal to the task of solving this problem. This Court (in *England v. Louisiana Medical Examiners*, 375 U.S. 411, 416,-417 [1964]) faced a closely related issue in the context of abstention, and concluded that a compelled trial in state court followed by a certiorari petition is no substitute for a full trial in federal court. As this Court acknowledged, the trial of facts can be the determinative event in the life of a lawsuit, particularly a constitutional lawsuit.

"It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. But such review...is an inadequate substitute for the initial District Court determination...to which the litigant is entitled in the federal courts. This is true as to issues of law; it is *especially true as to the issue of fact.*

> Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. *How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.*[2] There is always in litigation a margin of error, representing error in factfinding. Thus, in cases where, but for the application of the abstention doctrine the primary fact determination would have been by the District Court, *a litigant may not be unwillingly deprived of that determination.* The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his *right to litigate his federal claims fully in federal courts.*" (*England*, 375 U.S. at 416-417 [internal quotation marks and citations omitted]; emphasis added.)

Thus, as this Court acknowledged for abstention cases in *England*, it now seems necessary for this Court to acknowledge for the unique class of land use ripeness cases that a trial in state court may be a precondition, but it "may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in federal courts."

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[2] Recent law emphasizes this important point. In federal actions brought under 42 U.S.C. § 1983, such factual determinations may be made by a jury. (*City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 [1999].) Thus, the ruling below not only strips landowners of their right to litigate their federal claims in a federal forum but — adding insult to injury — denies them their Seventh Amendment right to a jury trial as well, when they sue under section 1983.

II

THE COURTS OF APPEALS ARE IN CONFLICT AS THEY SEEK TO ENFORCE BOTH *WILLIAMSON COUNTY* AND THE GENERAL RULES OF CLAIM AND ISSUE PRECLUSION. NO AMOUNT OF DENIAL BY THE RESPONDENTS CAN CHANGE THAT FACT.

The City and the Board insist that there is no conflict among the Circuits. In their words, it "simply does not exist." (Br. in Opp., p.6.) Incredibly, where others see conflict, the City and the Board see only "consistent rules" (Br.in Opp., p.6) that strike "a delicate balance" (Br.in Opp., p.9).

Wrong. That isn't an argument; it's a denial of reality.

The City and the Board insist that there is a "consistent" rule that landowners who "reserve" their federal issues can later pursue them in federal court. (Br. in Opp.,pp.6-7) That is a half truth. As shown in the Petition (pp. 13-17), *some* courts have so ruled,[3] while others have held that there is nothing that can be done to preserve such issues.[4]

That is the problem. These two lines of federal authority cannot coexist. Either there is a way to "ripen" federal issues by first litigating state issues in state court, or there is not. And if the federal issues are to be preserved for federal court litigation, then there must be a way to make that litigation meaningful, by

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[3] *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.d 1331 (5th Cir. 1976).

[4] In addition to the case at bench, see *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319, 1325 (10th Cir. 1998); *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725,726-728 (3d Cir. 1989).

then there must be a way to make that litigation meaningful, by permitting the plaintiffs to fully and meaningfully litigate those claims, without running into the brick wall of either claim or issue preclusion.

Whether a formal "reservation" is a proper way to resolve the problem is a question that needs to be addressed in the context of a consideration of the merits of this case. The point of discussing the reservation line of cases is to note the way that lower courts are struggling to come to terms with the *Williamson County/res judicata* shuffle by which legitimate federal claims are otherwise barred from litigation. Particularly when compared to the cases holding that state court litigation is *always* preclusive, the cases show the need for this Court's intervention. The "delicate balance" envisioned by the City and the Board (Br. in Opp., p.9) is no more than a shell game in which landowners' constitutional claims are hustled out the door.

III

IT IS OUTRAGEOUS FOR THE RESPONDENTS TO STAND BEFORE THIS COURT, HAVING ACKNOWLEDGED THEIR OWN UNCONSTITUTIONAL COMPLICITY IN ACHIEVING AN ERROR-RIDDLED VICTORY IN THE TENNESSEE COURTS, AND CLAIM THAT RAINEY BROTHERS HAS NO RIGHT TO COMPLAIN.

When reading The City/Board criticism of Rainey Brothers' conduct of the state court litigation, the real facts must be borne in the mind.

First, as the District Court found, the City and the Board confessed their unconstitutional treatment of Rainey Brothers as the state court trial was about to begin:

> "On the first day of the trial [in state court], the City Attorney, representing the City and the

> Board, stipulated in open court that the Board and the City had acted arbitrarily, capriciously, and illegally...[and][i]n essence, defendants stipulated that they had violated plaintiff's rights under both the Tennessee and the United States Constitutions." (App. B, p.8.)

Second, in their Sixth Circuit brief, the City and the Board confessed that they had led the Tennessee courts into error when they refused to award Rainey Brothers any compensation for those conceded constitutional violations. In their own words, "the state court *incorrectly* held that no monetary award would be granted because Tenn. Code Ann. § 29-20-205 precluded such an award...." (Final Br. of Appellees, p.30; emphasis added.) This is exactly why the case was ripe for federal court decision and is exactly what *Williamson County* contemplated - a failure by a state court to award compensation for an admitted unconstitutional taking.

Third, in their Sixth Circuit brief, the City and the Board also confessed that they led the Tennessee courts into error on the interlocutory appeal that struck constitutional claims from Rainey Brothers' complaint. To use their word, the Tennessee courts had "misinterpreted" Tennessee law when they so ruled. (Final Br.of Appellees, p.22.)

Thus, through their own arguments to the state courts, that "incorrectly" "misinterpreted" Tennessee law, the City and the Board used their governmental influence to achieve an unjust result in state court that even they felt the need to confess (albeit at a time they thought they were immune from the consequences of confession). For some reason, the City and the Board nonetheless argue that Rainey Brothers has not shown "that the state court mistakes amounted to an unconstitutional denial of a full and fair hearing." (Br. in Opp., p.5.) They overlook their

own recitation of the facts two pages earlier. There, they concede that "the state court mistakes" resulted in an interlocutory appeal in which the Tennessee courts refused to "relate back" Rainey Brothers' proposed amendments to their complaints, thus striking constitutional claims from their complaints, and wrongly precluding state court litigation of those issues. (Br.in Opp., p.3.) That interlocutory appeal tainted the entire proceeding because it stripped Rainey Brothers of the right to have its constitutional rights enforced. Regardless of what Rainey Brother may have done or not done after the eventual decision on the merits, the Tennessee courts had already decided not to listen to their constitutional claims, and that decision was final.[5]

And now, the City and the Board want this Court to put the final seal of approval on their tactics. Shame on them. This Court should have no part of such an argument. Plainly, Rainey Brothers had no "full and fair opportunity" to litigate its case in the Tennessee courts. As this Court has repeatedly held, such unfair results are not entitled to the "full faith and credit" of legitimate litigation. (*Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 480 [1982]; *Allen v. McCurry*, 449 U.S. 90, 95 [1980]; *Montana v. United States*, 440 U.S. 147, 153 [1979].)

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[5] The City/Board's attempt to squeeze some advantage from Rainey Brothers' litigational delay (Br. in Opp., p.12) is similarly disingenuous. Lost in their argument is the severe economic duress in which Rainey Brothers was placed by the illegal and invalid actions of the City and the Board. Please recall that Rainey Brothers' project was in mid-construction when the City and the Board unceremoniously and unconstitutionally pulled the rug out from under it. Note also that at no time did the City and the Board seek to dismiss the complaints or claim prejudice from any such delay. Nor did any of the Tennessee courts so much as mention the subject. The City/Board discussion is merely a red herring designed to deflect attention from their own constitutional defalcations.

CONCLUSION

The law of ripeness and *res judicata* in Fifth Amendment land use cases is chaotic. There is conflict and confusion in the lower courts. Commentators are nearly unanimous in their criticism of that confusion. Fifteen years after *Williamson County*, it is time for this Court to take stock and clarify what it intended to accomplish in formulating the Fifth Amendment ripeness rule.

Rainey Brothers prays that certiorari be granted.

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